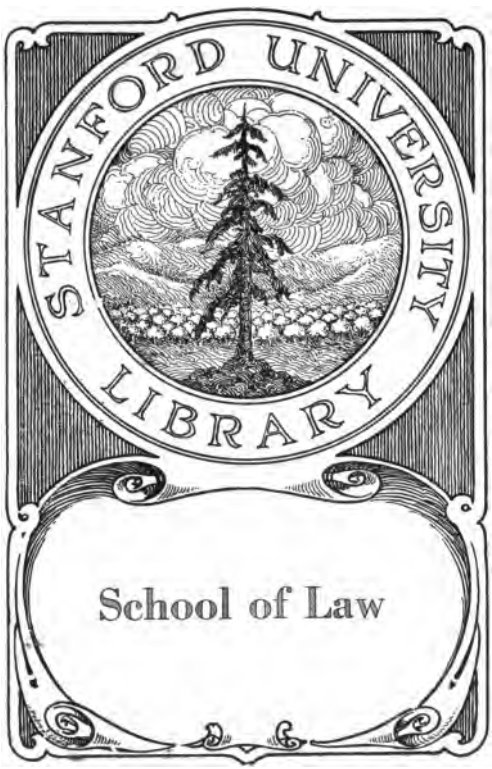
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VOLUME II

THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW

A CONTRIBUTION TO THE HISTORY
AND THEORY OF JURISTIC PERSONS
IN ANGLO-AMERICAN LAW

BY

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CHAPTER I

INTRODUCTION

Two opposing theories may be found in legal literature treating of the nature and status of corporations which have carried their activities into another legal sovereignty from that in which their charter was secured. One tends to repel them, to subject their activities within the state to peculiar burdens and restrictions, even to deny them corporate existence. The other welcomes them, places their property and their activities under the protection of international or constitutional law, and accords them a position of equality with domestic corporations. The two theories have their roots in divergent conceptions of the nature of corporations. The restrictive theory [1] tends to emphasize the extraordinary character of the privileges with which the members of a corporation are endowed, and the high nature of the act of sovereignty by which their corporate franchise is conceded. The liberal theory looks upon a corporation rather as a normal business unit, and its legal personality as no more than a convenient mechanism of commerce and industry. Of the restrictive theory, the economic substratum may be said to be the jealousy of local interests, the fear of world competition. Of the liberal theory, the material basis is the growing internationalism of business, of trade, of investment.

[1] I adopt, for convenience, the terminology which Mr. E. Hilton Young uses in his admirable study of *Foreign Companies and Other Corporations*. Cambridge (Eng.) University Press, 1912.

The restrictive theory in its most radical form denies the existence of a corporation beyond the boundaries of the state of its birth.[1] If a corporation, that "artificial being, invisible, intangible," derives all its powers from the law which created it, how can it exercise them where this life-giving law no longer operates? The champions of this theory insist that not only does a corporation exist only in contemplation of the law, but it exists only in contemplation of the law which created it. Corporate personality is a fiction of the law, and incorporation is merely a sovereign command to the courts to entertain this fiction, by treating as a person what is not a person in fact. From the very nature of sovereignty this command can be addressed only to the sovereign's own courts. Courts of other nations, to whom the command is not addressed, are left to view the situation with the unclouded eyes of truth, and see only what is there in reality, human beings going about their various businesses, assuming individual rights and liabilities, and bound together for purposes of mutual advantage by merely personal ties. If a foreign court were to treat these individuals collectively as a legal person, it would be setting up, by judicial fiat, the fiction to which alone corporate personality owes its existence. It would be not recognizing, but creating a corporation, a high prerogative of sovereignty which courts may not usurp.

The liberal theory cannot be so coherently and consistently set forth. It arises from several philosophic sources, and

[1] The best known representative of this theory is Laurent. *Droit Civil International Privé*, Vol. IV, sec. 119. There is a brilliant exposition by M. le Procureur Général LeClercq, before the Belgian Cour de Cassation. La Soc. La France C. Tongre-Hambursin, *Pasicrasie Belge*, 1847, at p. 398. The court, however, rejected his view, reversing the decision of the Tribunal de Namur, which had denied to a French insurance company the privilege of bringing suit. Dudley Field states the restrictive theory in his *Outlines of an International Code*, 2d ed., sec. 545. The theory is analyzed, and the literature reviewed, in Young, *op. cit.*, 24 ff., and in Pillet, *Personnes Morales en Droit International Privé* (Paris, 1914), sec. 16 ff.

makes its way by varying arguments. Those who, with the German jurists of the 19th century, look upon the will as the *fons et origo* of all jurisprudence, point out that a group, formed for a special purpose, and coöperating for a common end, has a will of its own, which can only find its expression in legal personality; and that this group will, this personality, is as real, and as truly entitled to universal recognition, as is the personality of the physical man.[1] Or, shifting the emphasis from the *a priori* to the empirical, they point out that while it may once have been true, as Savigny put it, that physical man alone in the common understanding, "clearly carries with him his claim to civil capacity in his corporeal capacity,"[2] yet changing industrial and social conditions have in modern times accorded to corporations also this inherent claim to legal personality.[3] The commercial world, whose habits of thought so largely influence the development of the law, has come to regard the business unit as the typical juristic entity, rather than the human being. Today a joint stock business firm which cannot sue, make contracts, and be the subject of rights and duties, is as much an anomaly as a human person similarly disabled. Hence it is considered that the customary law, growing out of popular thoughts and habits, now calls in every civilized country for recognition of the legal personality of the foreign corporation.[4] Or, again, the liberal system may rest on the theory of the international validity of acquired rights. A group of people go through certain legal forms which, by virtue of the *lex loci*, confer upon them a valuable legal right, personality. Without this legal right, the property which they own, the contracts which they, as a group, have made, cannot be legally protected. If they were to step into a neighboring

[1] See Pillet, *op. cit.*, 30 ff.

[2] Savigny, *System*, Bk. II, 277–278.

[3] See Young, 50.

[4] Von Bar, *Private International Law* (Gillespie transl.), sec. 41.

state, and that state were to deny their corporate existence, the property and contract rights would be impaired. Rights implied in the concession of legal personality are as much entitled to universal recognition as rights arising out of marriage, of contract, of the acquisition of property. They should be enforced by the local law unless some countervailing domestic interest is jeopardized.[1]

Not only civil recognition, but a certain degree of equality of treatment, is called for by the adherents of the liberal system.[2] The general principle of international law which accords equality of civil and commercial rights to foreigners is as applicable to corporations as to individuals. If freedom of incorporation prevails within the state, for given purposes, free access to foreign corporations for the same purposes and subject to similar restrictions follows as a necessary legal consequence. Especially is this true of commercial corporations. The powers granted to religious, educational, even charitable corporations, may be to some extent a reflection of domestic policy; but a commercial corporation has the same essential characteristics everywhere. It is looked upon as a cosmopolitan citizen transcending legal boundaries.

In broad outline the history of foreign corporations in American public law has taken the form of a gradual evolution from the extreme restrictive theory, through various midway stages of compromise toward a close approach to the doctrine of compulsory recognition. The early stages of this development emerge indistinctly in a period when this branch of our public law was not yet clearly articulate, when it was not yet embodied in texts and decisions, but was rather a part of the general habits of thought and action, implied in the records of what men did and the institutions they set up rather than in their systematic speculation. The final stages, also, are not yet clearly articulate. The Supreme

[1] This is the view adopted by Pillet, *op. cit.*, 46 ff. [2] Von Bar, p. 155.

Court of the United States is not yet committed to the liberal theory of foreign corporations. Especially in recent times, that tribunal has been cautious and hesitating in pronouncing new doctrines, bold though it has been in deciding particular cases. But in the past decade, in a striking series of decisions, one element after another of the restrictive theory has been sacrificed, and one tenet after the other of the liberal theory adopted. The final synthesis has not yet been made, but it does not seem far away.

It is the purpose of this book to trace the history of this gradual evolution, in the hope that it may throw some light on the significance of the recent changes, and suggest a method of approach to the many perplexities as yet unsolved. The traditional theory of foreign corporations which prevailed throughout most of the nineteenth century, unsuited though it was to modern economic conditions, had the merit of certainty and logical completeness. As a juristic conception, it was admirable. Now that the pressure of industrial evolution has thrown it into the discard, what was once certain has become doubtful, and a mass of speculative litigation is threatened. A new technique, conformable to the new conditions, and as consistent and logical as is possible in a subject so complex and so changeable, has become imperative. Such a technique calls for a reëxamination of first principles.

The historical method is especially important in a branch of the law such as the present one. The theory that a system of law is evolved in the brain of a jurist by the application of pure reason to philosophic first principles no longer needs to be combated. It is now recognized that most rules of law represent a rough compromise between those economic and social needs of the present which are able to make themselves felt, and the formulas and doctrines of the past, a compromise constantly being worked over and readjusted, all the

while striving toward logical consistency merely because inconsistency means litigation and waste of effort. This incessant working over of old law into new is taking place as much in constitutional law as in private law. Indeed, general phrases embodied in a constitution are often little more than mandates and guides for judicial law making. As raw material for this law making, judges must use the social institutions and concrete legal relations with which they are familiar. The dynamic element in the development of a principle of constitutional law is therefore generally to be found in a changing economic background. New economic phenomena, railroads, industrial combinations, the emergence of hitherto disregarded social classes, determine its growth. They must be taken into account if the study of constitutional law is to be more than fine-spun theory.

From another aspect, also, a study of economic institutions is a necessary part of juristic research. If economic changes are the dynamic element, formulated doctrines and adjudicated precedents are the static element in legal development. Courts can make law only slowly, by the gradual development of principles.[1] A legal doctrine, a formula, a distinction, contained in some early reported case, may be adopted for that reason alone, and quite rightly, for *stare decisis* has a practical justification in certainty and economy of effort. Yet it is true that doctrines once formulated have a potency which often long outlives their social justification. To the jurist who wrote the formula the words in which it was clothed may have borne an entirely different significance from that in which they are now understood. The form may have remained the same, while the content and substance changed. It is one of the functions of historical study to detect such formal survivals. When, for example, a modern doctrine of constitutional law rests its validity solely on the

[1] See Pound, 29 Am. Bar Ass. 397, 399.

words of a decision rendered fourscore years ago, it is important to inquire whether the substance to which those words were then attached is really the same as that to which we now attach them. When our forefathers spoke of corporations, did they not perhaps refer to a thing so different from the organizations that now bear that name, that their words and decisions are precedents only in a verbal and formal sense? Hence a study of constitutional law cannot begin with the Constitution. The men who framed that document, and the judges who first worked it over into a system of public law, were men who had been in close touch with their economic surroundings. We must look at their words through contemporary spectacles. And contemporary life had its roots in colonial America. This is my excuse for the first chapter of this book.

CHAPTER II

THE BEGINNINGS OF AMERICAN LAW OF FOREIGN CORPORATIONS

To the early American colonist, the term corporation connoted a great privileged trading company — the foreign corporation *par excellence* of the sixteenth and seventeenth centuries. These huge corporate aggregations, controlling foreign trade, exploring unknown lands, governing dependencies, dickering with foreign princes, raising armies, and levying war, were the principal objects of the " dollar diplomacy " of those days. Their relations with foreign sovereignties were constantly in the minds of statesmen. As early as the laws of Æthelred, there is an Institute of London referring to the Hanseatic League, the "Men of the Emperor, who, coming in their ships, were held worthy of good laws, like unto ourselves . . . but they must not engross the market against the burghers " of London.[1] From the thirteenth to the sixteenth century, the League had a charter to trade in England, and owned wharves in the " Steelyard " quarter on the Thames. But the burghers of London at length rebelled against the special privileges which it enjoyed, and Queen Elizabeth revoked the charter.[2] English chartered corporations, also, were deemed worthy of good laws abroad. The Merchant Adventurers long held franchises in Germany, Holland, and elsewhere.[3] Ivan the Terrible gave trade privileges to the Russia Company, chartered by Queen Mary in

[1] Liebermann, *Gesetze der Angelsachsen*, I, 234; Thorpe, *Ancient Laws and Institutes of England*, I, 300. See Anderson, *An Historical and Chronological Deduction of the Origin of Commerce*, 125.

[2] Cawston and Keane, *The Early Chartered Companies*, 6 ff.

[3] *Ibid.*, 27.

1554.[1] The Eastland Company monopolized the Baltic trade, and the Turkey Company that of the Levant.[2] The great East India Company, chartered in 1600, was authorized to trade in Asia, America, and Africa, "any statute, usage, diversity of religion or faith, or any matter to the contrary notwithstanding, so as it be not in any country already possessed by any Christian potentate in amity with her Majesty, who shall declare the same to be against his or their good liking." Its history is familiar. It did not lose its monopoly till 1833.[3]

So far as the foreign potentates were Christian, it was obvious that the reception which these corporations would receive rested on comity, and generally on express comity. *In partibus infidelium*, the corporations were themselves an arm of sovereignty, exercising political and diplomatic functions. Where her sovereignty extended, England could give the members of her incorporated trading companies a full monopoly of commerce; but with foreign Christian nations, the monopoly would be good only against English traders.[4] King James seems once to have tried to give the Russia Company exclusive whaling privileges around Greenland, valid even against foreigners; and he sent seven armed vessels along to make good the grant. They proceeded to annex the archipelago to the British Empire. But ultimately the Dutch sent a fleet of eighteen fighting ships, and the franchise remained a piece of parchment.[5] This was, in truth, a time when statesmen troubled themselves less whether legal theory required

[1] See their Russian charter in Anderson, *op. cit.*, II, 102. The arrangement seems to modern eyes to have been somewhat one-sided, as for instance the following: (Clause vii) "In case any English be wounded or killed, due punishment shall be inflicted; and in case the English shall wound or kill any, neither their nor the company's goods shall be forfeited on that account."

[2] For an illuminating account of the functions of these trading companies, see John P. Davis, *Corporations, Their Origin and Development*, II, chs. 3–5. New York, 1905.

[3] Cawston and Keane, 86, 152; Davis, II, 114.

[4] Cawston and Keane, 40.

[5] *Ibid.*, 45–60.

the recognition of a foreign corporation, than over the number of war ships that accompanied it, or the wealth of the trade which it might bring.

The special privileges with which they were endowed were of course the very life of these companies. The privileges might belong to the merchants individually, as in the earlier form of "regulated Company." Each member employed his own capital — "traded on his own bottom" — was absolutely liable for all his debts, and held a non-transferable membership. The object of membership was to confer the privilege of trading in the parts covered by the charter. The regulated company was the application, in foreign trade, of the principle of the gilds, which at that time monopolized the principal trades, not only in England, but throughout Europe.[1] Or again the privileges might be vested in the corporation itself, as with the great joint stock companies. The East India Company was of this sort. They resembled more closely the modern corporation, with limited liability, transferable shares, and trading capital owned in the name of the company. In either case the foremost object of incorporation was to give special privileges not enjoyed by other citizens. "Liberty," "privilege," "franchise," "charter," were about synonymous terms. The distinguishing feature of these companies was not legal personality, but monopoly.

These institutions were familiar in the colonies. Indeed many of the colonies were themselves no more than foreign corporations, at least from the point of view of the Indians. The charters of Massachusetts Bay, of Plymouth, of Virginia, of Carolina, were the charters of trading companies; their governmental functions were incidental to trade and commerce.[2] It was the Dutch West India Company, chartered by the States General in 1621, which colonized the New Nether-

[1] Baldwin, *Modern Political Institutions*, 161 ff.

[2] *Ibid.*, 166, 167. And see the chapter on *Colonial Companies* in John P. Davis, *op. cit.*, II, ch. 6.

lands.[1] This company, besides its exclusive trading privileges, had authority to "make contracts, engagements and alliances, with the princes and natives of the countries" comprehended in the grant, and power to enforce these treaties and protect its trading rights, if need be, by war. To the north lay the domain of the wealthy Hudson's Bay Company, chartered in 1670, and assured "the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks, and sounds" about the Bay, a vast region, in which no English subject might "visit, frequent or haunt or adventure or trade" without its permission.[2] The proprietary colonies resembled these trading companies in general structure, although not in corporate form.[3] Georgia, on the other hand, was more akin to a charitable corporation, but even there to "increase the trade, navigation and wealth" of Great Britain was an important consideration.[4]

There were a few monopolistic trading companies aside from the colonies themselves. In Pennsylvania, William Penn, before coming to his new domains, had already chartered the "Free Society of Traders in Pennsylvania," but he declined to accept on its behalf an offer of exclusive trading privileges with the Indians, the charter reciting, instead, that all should have "the same Liberty of private Traffique, as though there were no Society at all."[5] The corporation was above the control of the colonial legislature, however, and of such dignity that it at once began negotiations with the "Emperour of Canada" for trading arrangements.[6]

[1] O'Callaghan, *History of New Netherland*, I, 89.

[2] Winsor, *Narrative and Critical History*, VIII, 5.

[3] John P. Davis, *op. cit.*, 191.

[4] *Ibid.*, 182.

[5] Joseph S. Davis, *Essays in the Earlier History of American Corporations*, Cambridge (1917), I, 41 f. This valuable study, in two volumes, appeared when the present work was almost completed. I have been able, however, to make substantial use of Mr. Davis' extensive researches in revising this chapter.

[6] Baldwin, *American Business Corporations before 1789*, 8 Amer. Hist. Rev. No. 3, 453.

On the other hand the Ohio Company, chartered as late as 1749 in England, seems to have had exclusive privileges in the Indian trade, privileges which it soon had to dispute with the French, whose claim of discovery extended over the tributaries of the Mississippi.[1] There was doubt, however, whether within the geographical limits of the colonies, a monopoly could be granted by the crown. In 1720, the British Lords of Trade were advised by Attorney-General Raymond and Solicitor-General Yorke not to sanction the grant to divers citizens of " a patent for the sole curing of sturgeon in America, and importing the same into this country," on the ground that " we are very doubtful upon consideration of the statute of the 21st of Jac. I. c. 3 [Statute of Monopolies] whether the prerogative of the crown, for making grants of this nature, exclusive of other persons, extends to the plantations." [2]

Other charters of a monopolistic character were granted by the colonial authorities themselves, although genuine exclusive trading companies were rare. In Massachusetts Bay, a " free company of adventurers " was in 1643 given a somewhat indefinite monopoly of trade " in those parts," apparently the Indian trade.[3] The Governor of New Jersey asked the assembly, in 1759, to establish " an incorporate company on a joint stock with an exclusion of private traders," to trade with the Indians, but nothing came of the matter.[4] A grant of a similar monopoly by the Virginia legislature, shortly before the Revolution, was annulled by the Lords of

[1] Hildreth, *History of the United States*, II, 433–434.

[2] Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, chiefly concerning the Colonies, Fisheries and Commerce of Great Britain.* Amer. ed., 202.

[3] Mass. Col. Records, II, 60. I am indebted for this and several of the following citations to Andrew M. Davis' study of " Corporations in the Days of the Colony," in *Publications of the Colonial Society of Massachusetts*, I, 183, 196.

[4] N. J. Archives, XVII, 219–223. Cited in Joseph S. Davis, I, 91.

Trade.[1] That there were not more of these companies was mainly due, no doubt, to the individualistic character and habits of life of the early settlers, but a grave doubt as to their power to create them may have contributed. The Connecticut assembly expressed this doubt, after a discouraging experience with an attempted incorporation. A charter had been granted, in 1732, to the New London Society United for Trade and Commerce, with sweeping powers; but no sooner was it formed than the society proceeded to deluge the colony with such a flood of paper money that the assembly was constrained to meet in special session and forfeit the charter. The following year the assembly inquired carefully whether its own colonial charter gave it power to incorporate trading companies; and after hearing arguments of counsel, it:

> Resolved, That although a corporation, [*i. e.*, a chartered colony] may make a fraternity for the management of trades, arts, mysteries, endowed with authority to regulate themselves in the management thereof: yet (inasmuch as all companies of merchants are made at home by letters patent from the King, and we know not of a single instance of any government in the plantations doing such a thing) that it is, at least, very doubtful, whether we have authority to make such a society; and hazardous, therefore, for this government to presume upon it.[2]

Establishment of gilds, with exclusive privileges, was a common matter in the early days, as the Connecticut Assembly pointed out. In 1648, the "Shoemakers Incorporate" were formed into a gild in Boston, with power to pass by-laws to regulate the trades, to impose penalties, and to apply to the County Court to suppress persons not approved by the officers of the gild as "sufficient workmen."[3] Similar privileges were given the "Coopers Incorporate." Monopolies to

[1] E. B. Russell, *Review of American Colonial Legislation by the King in Council*, New York, 1915, 117.

[2] *Col. Records of Conn.*, VII, 421.

[3] *Mass. Col. Rec.*, II, 249, 250.

vintners, to undertakers of iron, were familiar.[1] Sometimes, these monopolies were given to individuals, with no suggestion of incorporation; they gradually shaded, indeed, into ordinary patents of invention, such as the monopoly, in 1652, to Edward Burt, for ten years, of the manufacture of salt by a new method discovered by him.[2]

There were, it is true, educational, religious, social, and charitable corporations, without the monopolistic feature. There were even a few business corporations of a semi-public nature, whose object was probably rather to permit the concentration of a large amount of capital, for undertakings which private individuals would not venture upon — to build a wharf, for the furtherance of navigation,[3] or to provide for mutual insurance against fire.[4] But the monopolistic corporation was the typical one, and its prevalence gives us a valuable clew to the political thought of the time with respect to corporations in general.

In giving these corporations a place in their political philosophy, it is to be expected that the views of our forefathers should have depended somewhat on whether the particular philosopher and the persons and classes with whom his social sympathies lay, were among the beneficiaries of these valuable privileges, or were among those whose activities were restrained by them. The " insiders," on the one hand, drew their inspiration from the century long struggle between the English boroughs and the kings and feudal barons, and more immediately from the struggle for charter rights and priv-

[1] Andrew M. Davis, *op. cit.*, 196.

[2] *Ibid.* Corporate monopolies of this sort were familiar until long after the Revolution. See, for instance, in Vermont, " An Act to prolong the time of exclusive right of making glass in this state, to the president and directors of the Vermont Glass Factory," as late as November 16, 1813.

[3] As the Union Wharf Company, in New Haven, in 1760, and the Proprietors of the Boston Pier, in 1768.

[4] Philadelphia Contributionship for the Insuring of Houses from Loss by Fire. Smith and Reed, *Laws of Pennsylvania*, I, 279. Benjamin Franklin was one of its first directors.

ileges between the colonies and the king. These struggles had come to invest such terms as "liberties," "privileges," "immunities," "franchises," the stock terms found in all corporate charters, with a peculiar sanctity, as things they and their forefathers had fought and bled for.[1] On the other hand the "outsiders" relied on the powerful appeal of the philosophy of natural law, claiming rights not from any charter or sovereign grant, but from the inherent nature of man.[2] This conflict between the philosophy of liberties, privileges, and immunities, and the philosophy of natural rights, is one of the most interesting phenomena in the history of early American political thought.[3] It came dramatically to the surface when the delegates assembled at the Philadelphia Congress in 1774, to protest against the encroachments of Great Britain. We read of long debates, before the members could

[1] See the samples of Charters of Liberties reprinted in Messrs. Bland, Brown and Tawney's *English Economic History*, Select Documents, 116 ff.

[2] See the illuminating protest to the English Parliament, against commercial monopolies, in 1604 (*Journals of House of Commons*, I, 218. Reprinted in *English Economic History*, Select Documents, 443.) First among the objections is the following:

"*Natural Right:* — All free subjects are born inheritable, as to their land, so also to the free exercise of their industry in those trades, whereto they apply themselves and whereby they are to live. Merchandize being the chief and richest of all other, and of greater extent and importance than all the rest, it is against the natural right and liberty of the subjects of England to restrain it into the hands of some few, as it now is."

[3] There is a suggestive passage in John P. Davis, *Corporations*, II, 241:

"The departure from the feudal system, it is hardly necessary to suggest, was accomplished largely through a chaotic mass of exemptions of subjects from feudal obligations. The unevenness of the development of exemptions, combined with the inability of the state to absorb the political powers lost by the feudal nobility — in other words its inability to substitute, until after centuries of development, a national state for an aggregate of feudal manors — left here and there bunches of political powers vested in communities that were afterward viewed as technical corporations. The work of the English law, during the twelfth, thirteenth and fourteenth centuries, as far as the promotion of liberty was concerned, was largely to construe and enforce the mass of exemptions. The jurist comprehended the nature of individual rights and obligations by comparing them or contrasting them with normal rights under the decaying feudalism; from that point of view all (or nearly all) individual rights and obligations were in a sense exceptional. But the exception

come to an agreement whether they should base their protest on the liberties and privileges granted them by their colonial charters, or on the special rights of Englishmen wrested from kings and barons and carried by the colonists to their new home, or on the inherent and inalienable rights of man.[1] With a sagacity which was lawyer-like, if it was not philosophical, the Congress ended by claiming, "by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts," all three classes of rights, and enumerating them successively in their Declaration.

As against English encroachments, these various kinds of rights could live together harmoniously. But in domestic affairs they parted company. A right specially granted by charter is obviously inconsistent with a natural right inherent in all. The two philosophies, like the two economic interests which they idealized, were bound to clash. In the great debates over the repeal of the Pennsylvania charter of the Bank of North America, in the days of the Confederation, the two philosophies appear in constant conflict.[2] The following, from the speech of the leading opponent of the bank, is an example:

> And here I will make this concession — that there are charters so sacred that they cannot be revoked. But there is a material distinction between charters — and the opinions of many have been very wrong on that head. . . . There is a strong reason why persons from Europe are so highly prejudiced in favor of charters. In the twelfth and

became the rule when by the passing away of feudalism the system of law reached the level of the individual and interpreted his rights and obligations directly, rather than by contrasting them with a prior status, even though it continued to use in describing them the obsolete terminology of feudalism. The communities to which clusters of powers had been transferred were now compared, not with the feudal lords by whom the powers had been conceded, but with the normal English subject."

[1] John Adams, Diary, *Works*, II, 370.

[2] They are reprinted in Carey, *Debates and Proceedings of the General Assembly of Pennsylvania, on the Memorials Praying a Repeal or Suspension of the Law Annulling the Charter of the Bank.* 1786.

thirteenth centuries, Europe was in the lowest state of vassallage, the people were in some measure rooted to the soil, and sold with it. While affairs were in that situation, the kings and powerful barons granted charters of incorporation to towns and cities, thereby exempting them from the common vassallage of the state, and bestowing on them particular immunities; thus giving them political existence. These charters were sacred because they secured to the persons on whom they were bestowed their natural rights and privileges. But there are, sir, charters of a very different nature. And here it is necessary to fix the point of distinction. Charters are rendered sacred, not because they are given by the assembly, or by Parliament — but by the objects for which they are given. If a charter is given in a favour of a monopoly, whereby the natural and legal rights of mankind are invaded, to benefit certain individuals, it would be a dangerous doctrine to hold, that it could not be annulled. All the natural rights of the people so far as is consistent with the welfare of mankind, are secured by the constitution. All charters granting exclusive rights are a monopoly on the great charter of mankind. The happiness of the people is the first law.[1]

The identification of incorporation with the grant of special and exclusive privileges or monopolies, and the fear that the corporation would infringe on the " natural rights " of citizens, was the chief source of the early opposition to corporations. Constantly we meet the fear that the Congress of the Confederation, or some state legislature, might erect a trading company on the model of those of the old world. It haunted the minds of the opponents of the Bank of North America.[2] The fear that the Commerce Clause might give Congress power to erect commercial monopolies was made one of the principal grounds of opposition to the Constitution.[3] And when Madison, in the Constitutional Convention,

[1] *Debates*, 22. See also 64. And see, at a later period, the speech of John Sergeant, on the repeal of the charter of the Bank of the United States, *Select Speeches of John Sergeant*, 175–176.

[2] *Debates*, 69.

[3] See objections of Mr. Gerry, Farrand, *Records*, II, 635: "The Power given respecting Commerce will enable the Legislature to create corporations and monopolies." And of Mason, *Ibid.*, 640: " Under their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce."

twice attempted to secure the adoption of a clause expressly giving Congress power to grant charters of incorporation, it was defeated by votes of three states to eight, King opposing it on the ground that it would be referred, in some states, to the power to grant a bank monopoly, in others to mercantile monopolies. Colonel Mason opposed the grant on the ground that he was "afraid of monopolies of every sort." [1] Four of the states accompanied their ratification of the Constitution with the recommendation, among others, "That Congress erect no company of merchants with exclusive advantages of commerce," or other words of like import.[2] In the Congressional debates on Hamilton's national bank project, we find the argument, again, that the bank would be a precedent for the granting of monopolies of the East and West India trade.[3] These are merely samples of a widespread sentiment.[4]

[1] Madison, *The Constitutional Convention* (Hunt ed.), II, 373.

[2] Massachusetts. Elliott, *Debates*, I 323. New Hampshire, *Ibid.*, 326. New York, *Ibid.*, 330. Rhode Island, *Ibid.*, 337. [3] Elliott, *Debates*, IV, 412.

[4] Mr. J. S. Davis quotes some striking passages of this character in his chapter on the Society for Establishing Useful Manufactures. The following, from a letter of "Anti-Monopolist," in the General Advertiser, January 23, 1792, is typical:

"Wealthy speculators of all denominations are incorporated and vested with exclusive privileges, partial laws are made in their favor, the benefit of which others do not enjoy; and they are exempted from the common burthens imposed on the rest of society. This propensity for corporations is very dangerous to the liberties of a people; it raises up various bodies of men of the most influential description in the community and separates them from the mass of the people; at the same time by distinguishing them with peculiar marks of favor, it attaches them to the ruling powers by the common ties of gratitude and self-interest, and therefore gives an additional, or rather an artificial weight to government which our constitution does not warrant. But the subject becomes still the more alarming, if we recollect that these corporations are looked on by those who frame them as sacred and irrevocable; for in the course of time if this notion continues and new corporations succeed each other as they have lately done, we shall inevitably have all our wealthy citizens, whether they be engaged as merchants, manufacturers or speculators, formed into corporate bodies, to aggrandize themselves, and increase the influence of government."

Compare, also, John Adams' outburst: "Is not every bank a monopoly? Are there not more banks in the United States than ever before existed in any nation under Heaven? Are not these banks established by law upon a more aristocratical principle than any others under the sun? Are there not more legal corporations—

Most striking of all is Jefferson's remark, in The Anas,[1] that although Madison submitted to the Constitutional Convention a proposal to authorize Congress to grant corporate franchises, it was rejected, "as was every other special power except that of giving copyrights to authors and patents to inventors, the general power of incorporating being whittled down to this shred."

Among persons who thus identified incorporation with monopoly and exclusive franchise the law of foreign corporations must have been most simple. It hardly needed argument that one sovereign could not give a monopoly in the territory of another sovereign. And as long as these corporate monopolies were looked upon with such a jealous eye — the power rigidly confined to what the charter expressed, and its language strictly construed against them — international comity could hardly expect the courts of the foreign sovereign to admit them without express legislative mandate. There were, however, formidable advocates of the more modern view of corporations. Foremost among them was Alexander Hamilton, who vigorously combated the view that incorporation necessarily contemplated monopoly. His letter to Robert Morris, advocating a bank, written when he was only twenty-three years old, contains a clear statement of this view,[2] and in his opinion on the constitutionality of the Bank Bill,[3] he reiterated it:

literary, scientifical, sacerdotal, medical, academical, scholastic, mercantile, manufactural, marine insurance, fire, bridge, canal, turnpike, etc. — than are to be found in any known country of the whole world? Political conventions, caucuses, and Washington benevolent societies, biblical societies, and missionary societies, may be added — and are not all these nurseries of aristocracy?" Letter to John Taylor, April 15, 1814. *Works*, VI, 510. And see Raymond, *Elements of Political Economy* (1819), II, ch. 6: "The very object, then, of the act of incorporation is to produce inequality, either in rights, or in the division of property. *Prima facie*, therefore, all money corporations are detrimental to the national wealth. They are always created for the benefit of the rich, never for the poor."

[1] Vol. IX, 191. *Works*, Ford ed., I, 278.

[2] *Works*, Lodge ed., III, 340. [3] *Id.*, III, 451.

A strange fallacy seems to have crept into the manner of thinking and reasoning upon this subject. Imagination seems to have been unusually busy concerning it. An incorporation seems to have been regarded as some great, independent substantive thing; as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a quality, capacity, or means to an end. Thus a mercantile company is formed, with a certain capital, for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary mean. Suppose that an incorporation were added to this, it would only be to add a new quality to that association; to give it an artificial capacity by which it would be enabled to prosecute the business with more safety and convenience.

Robert Morris, in the Pennsylvania legislature, made the same point.[1] These men, however, were bending every effort to broaden the power of the national government; their philosophy, as well as the exigencies of their propaganda, called for a belittling of the powers of the states. Hence it is not surprising that despite their more modern ideas on the nature of corporations, there is nothing in their printed works even suggesting that a state would have power to create a corporation which would be entitled to recognition in the other states.

What little there is in the legal and political writings of the time tends to support the opinion that the extreme restrictive theory of foreign corporations was generally assumed. The material is somewhat meager. In so far as there was any system of constitutional law in the provinces, it was administered by the British Board of Trade, which, in the form of recommendations to the King to guide him in the exercise of his power to annul colonial legislation, exercised functions in many ways analogous to the judicial review which our Supreme Court exercises over state legislation.[2] Although it

[1] Carey, *Debates*, 39.

[2] See the description of the Board's functions in Oliver M. Dickerson, *American Colonial Government*, 1696–1765. Chapter 5 gives a summary of the grounds on

often acted on grounds which were frankly legislative, it developed, with the help of able crown lawyers, in the main fairly consistent policies of a juristic character. Laws which invaded the royal prerogative, or exceeded charter powers, or interfered with vital principles such as religious freedom, or conflicted with the fundamental laws of England, were regularly vetoed. Laws regulating foreign commerce were considered beyond the powers of the colonies, and encroachments and retaliation among the colonies were frowned upon. The Lords discountenanced consistently any attempt on the part of a colony to extend its legislative jurisdiction beyond its boundaries. Thus a Pennsylvania statute was annulled because it extended the colony's criminal jurisdiction to a crime committed outside the state.[1] And when Rhode Island, in 1703, established a court of admiralty, the law was annulled, on the advice of the Board, based on an opinion of Attorney-General Northey, that the legislature had:

> Power to erect only courts for determining all actions, causes, matters, and things happening within that island, which doth not empower them, to erect a Court of Admiralty, the jurisdiction of such court being of matters arising on the high sea, which is out of the island.[2]

It was on this principle that was decided the first case on foreign corporations in America that I have found. The General Court of the Province of Massachusetts Bay, in 1762, chartered "The Society for Propagating Christian Knowledge Among the Indians of North America," and authorized it to accept funds and apply them " to the use and benefit of such tribes of Indians as they shall think proper." The Lords of Trade, however, represented that:

which laws were annulled during this period. And see E. B. Russell, *Review of American Colonial Legislation by the King in Council*, New York, 1915.

[1] Russell, 150.

[2] Colonial Office, 4, 1262. Quoted in *Dickerson, op. cit.*, 235.

We are humbly of opinion that this Act is liable to several objections, for in the first place the operation of the Act, though the Society itself would consist only of the inhabitants of the Massachusetts erected by an Act of that Province, would extend beyond the limits of the Province itself and in the second so extensive a power given to one colony may hereafter interfere with any general plan your Majesty may think it advisable to pursue for the management of the Indian Affairs in North America.

In consequence the King repealed the law.[1] The case is hardly important, except as a curiosity. It was not until the Revolution had driven the colonies to the necessity of acting as a national unit, and of establishing institutions which would have a national scope, that their statesmen began to consider whether there was any way by which a state could erect money corporations which would be recognized throughout the Union. In the darkest hours of the Revolution, when soldiers had neither food nor clothing, and were threatening mutiny if they did not get their rations and pay, Robert Morris and a small group of friends started a private bank to raise funds, and soon after applied to Congress for a national charter of incorporation. The problem at once presented itself: Had Congress power to charter a bank? Each state, under the Articles of Confederation, "retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not, by the confederation, expressly delegated to the United States in Congress assembled." The doctrine of implied powers, triumphant under the Constitution, found a difficult obstacle in that word "expressly." But if Congress could not charter a bank of national scope, could any of the states? Madison, who already in those days, federalist though he then was, thought that Congress had no power to establish a bank, indicates that some of its opponents were driven to this contention. He wrote on Jan. 8, 1782:

[1] The Act and the opinion of the Lords of Trade may be found in 4 Acts and Resolves of the Province of Massachusetts Bay, ch. 32, 520, 563.

The immediate interposition of Congress was rendered the more essential, too, by the sudden adjournment of the Assembly of this state [Pennsylvania] to whom the Bank might have been referred for the desired incorporation, which, it was the opinion of many, would have given them a sufficient legal existence in every State.[1]

Congress swallowed its scruples, since the emergency was great, and incorporated the bank, but it seems to have been doubtful of its powers, for though the act used present words of incorporation, it provided "That nothing hereinbefore contained shall be construed to authorize the said corporation to exercise any powers, in any of the United States, repugnant to the laws or constitution of such state."[2] And it adopted a resolution urging the state legislatures "to pass such laws as they may judge necessary for giving the foregoing ordinance its full operation, agreeable to the true intent and meaning thereof." More specifically, it had already recommended that they give the bank a monopoly, within state boundaries, during the progress of the war. Pennsylvania, Rhode Island, Connecticut, New York, and Massachusetts passed legislation approving the charter.[3]

To give the bank better standing, especially in Philadelphia, its owners soon procured a charter from the Pennsylvania legislature. But despite Mr. Madison's opinion, it was generally believed that this charter was of no value outside the state, and the sponsors of the bank, grown more bold as their success became assured, and as the prestige of the general government became more marked, began to insist most strongly that the Congressional charter was valid. The argument sustaining the charter, in the face of the reservation to the states of all powers not expressly granted to the Confederation, is an ingenious one, and it bears directly on our present inquiry since it was grounded on the inability of the

[1] Letter to Pendleton, Madison Papers, I, 105.
[2] Clarke and Hall, *Bank of the United States*, 13.
[3] Wilson, *Works*, I, 553.

states to form corporations extending beyond state boundaries. James Wilson, one of the foremost jurists of the day, and himself a director of the bank, seems to have originated the argument. He said:

It is true, that by the second article of the confederation, "each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not, by the confederation, *expressly* delegated to the United States in Congress assembled."

If, then, any or each of the states possessed, previous to the confederation, a power, jurisdiction or right to institute and organize, by a charter of incorporation, a bank for North America; in other words — commensurate to the United States; such power, jurisdiction and right, unless expressly delegated to Congress, cannot be legally or constitutionally exercised by that body.

But, we presume, it will not be contended, that any or each of the states could exercise any power or act of sovereignty extending over all the other states, or any of them; or, in other words, incorporate a bank, commensurate to the United States.

The consequence is, that this is not an act of sovereignty, or a power, jurisdiction or right which, by the second article of the confederation, must be expressly delegated to Congress, in order to be possessed by that body.

If, however, any person shall contend that any or each of the states can exercise such an extensive power or act of sovereignty as that above mentioned; to such person we give this answer — The state of Massachusetts has exercised such power and act: it has incorporated the bank of North America. But to pursue my argument.[1]

He then develops the principle, later so effectively used by Marshall, of powers inherent in the nature of an independent nation and necessarily implied in its formation.

Pelatiah Webster argued in the same tenor, in his "Essay on Credit," published in 1786:

A power of incorporating a national bank never did exist in any of the states. They might erect banks, or any other corporations, and

[1] Considerations of the Power to Incorporate the Bank of North America. *Wilson's Works*, I, 556.

call them by what *name* they pleased, but their *authority*, like that of all their laws, must be limited by the bounds of the state, and could not extend beyond them.[1]

The legal status of this great corporation was a curious one, and raised problems whose novelty must have troubled the lawyers of the time. After both Congress and the Pennsylvania legislature had incorporated the bank, Pennsylvania repealed its charter. What, then, was its legal position within the state? It certainly continued doing business, some said as a private bank, others as a national bank. Then Delaware granted it a charter,[2] and the directors appear to have accepted it without leaving the state, although for a while they contemplated moving their business into Delaware, to secure its benefits. Then Pennsylvania repented, and gave them a new charter, but different in its terms, and more rigid in its restrictions, than the Congressional charter. What was the effect when two sovereignties, claiming concurrent power to charter banks in the same territory, gave the same corporation inconsistent grants of power? Their own counsel advised them that this presented no difficulty.[3] But Hamilton was of opinion that the acceptance of the inconsistent state charter was a surrender of the Federal charter.[4] Nearly fifty years later, the bank being in need of more liberal charter powers, its directors conceived the idea of resuming the old Congressional charter, and issuing new stock by virtue of it. The matter was submitted to three of the leading lawyers of the day, James S. Smith, Horace Binney and John Sergeant, and they reported that " neither

[1] Misc. Pamphlets, Congressional Library, No. 730, 28. See *ibid.*, 33. The same line of reasoning was suggested in the later debates on the First Bank of the United States, e. g., by Sedgwick, Clarke, and Hall, 53, and in the opinion of Randolph, *ibid.*, 87.

[2] Booth, *Laws of Delaware*, II, 836.

[3] Report of Stockholders' Meeting, January 9, 1786. Lewis, *History of the Bank of North America*, 67.

[4] Clarke and Hall, 25.

the bank nor the stockholders have any corporate faculties or capacities but such as are derived from the laws of Pennsylvania, and that no act they can do can confer or revive any other corporate faculties or capacities." [1]

Strong evidence of a prevalent belief that express legislation was necessary to give a foreign corporation legal standing, is to be found in the frequent use of the device of concurrent incorporation in two or more states. Beside the Bank of North America, which on account of its federal charter may be placed in a class by itself, there were no less than eleven of these corporations, each with from two to three charters.[2] Today such interstate corporations have become commonplaces; but it is impossible to read the accounts of the organization of the first of these corporate innovations without a feeling that we are in the presence of a genuine and bold legal invention.

The first of these institutions was formed in colonial days, by the Episcopal Clergy, as a semi-charitable mutual insurance scheme.[3] In 1767, a committee drew up a plan for the formation of " The Corporation for the Relief of the Widows and Children of Clergymen in the Communion of the Church of England in America," to include the clergy of the three colonies of Pennsylvania, New Jersey, and New York. In each of these colonies, a committee of two was appointed to secure an identical charter from the Governor. On October 2, 1767, the corporation held its organization meeting, in Burlington, N. J., and there " the president having taken the chair, the different charters were read and compared with each other." [4] " Without breaking up," the meeting then travelled to Philadelphia, where by-laws were adopted.

[1] Lewis, 94.

[2] The complete list is in Joseph S. Davis, II, 30.

[3] There is a valuable account, drawn from the original records, in J. W. Wallace, *A Century of Beneficence*, Philadelphia, 1870.

[4] Minutes. Quoted in Wallace, 19.

Although it derived its powers from three different sources, the institution was clearly regarded as a single corporation, with one legal personality, not three. As Horace Binney said of it, nearly a century later: [1]

> The Corporation was one and the same in each of the three provinces. The objects of the three charters, the persons incorporated, the trusts, the powers, and the funds, were the same; and the concerns of the Corporation were regulated by the same managers or officers, meeting in Pennsylvania, New Jersey, and New York, according to the by-laws of their own appointment.

It had, he might have added, a single seal, procured from England at considerable expense, through the munificence of one of its patrons. After the Revolution, the corporation obtained a reaffirmation of its three charters from the new state legislatures, but soon after it was broken up into three state elements. The formalities observed are significant. Authority to divorce the union was first obtained from each of the states; an instrument was then drawn up by which each member released every other member from all obligations under the original charter. To this instrument the seal of the corporation was duly affixed. Immediately after performing this, its last act, the seal was solemnly broken by the President of the corporation, and the entity stood dissolved.[2]

The construction of canals and waterways offered a field of activity in which the need of corporate institutions transcending state limits was urgently felt, and here the device of double incorporation took more permanent hold. George Washington seems to have been the pioneer promoter in this field. Even before he was called to take command of the Revolutionary armies, he had conceived the great project of rendering the Potomac navigable, and joining it by canal

[1] Preface to Fundamental By-Laws and Tables of Rates, Philadelphia, 1851.
[2] Wallace, 50.

with the Ohio, thus diverting through the Middle Atlantic States the traffic which would otherwise go down the Mississippi or the St. Lawrence. His letters describe the difficulty of inducing the states to coöperate.[1] As soon as he was relieved of his command, he took up the project with vigor. In a letter to Governor Harrison, of Virginia, he proposed that the state should incorporate a canal company, and " request the concurrence of Maryland in the measure."[2] The legislature took up the suggestion eagerly, and Washington and Gates went as emissaries to the Maryland Assembly to procure their coöperation. A committee was appointed to meet them, and in joint conference it was resolved: " That it is the opinion of the conference that the proposal to establish a company for opening the River Potomac merits the approbation of, and deserves to be patronized by, Virginia and Maryland; and that a similar law ought to be passed by the legislatures of the two governments to promote and encourage so laudable an undertaking." [3] The result was two charters, to the same incorporators, in identical terms, from two sovereign and independent states. They contained the usual grants of corporate powers, the right of eminent domain, the right to charge a fixed schedule of tolls, and the canal was to be open to all who paid, " subject, nevertheless, to such regulations as the legislature of the said states may concur in," for the prevention of customs frauds. The organization meeting was held in Alexandria, Va.; no meeting to accept the Maryland franchise seems to have been thought necessary. George Washington was elected its first president. Its business was conducted as a unit, funds derived from Maryland and Virginia stockholders were mingled, it was to all practical intents one legal person. And it continued to look upon the

[1] Letter to Jefferson, March 29, 1784. *Works*, IX, 30.

[2] *Works*, IX, 65.

[3] Pickell, *A New Chapter in the Early Life of Washington*, 44. See House Report 228, 19th Congress, 1st Sess. Appendix, 32.

two states as its joint masters, and petitions for extension of time, numerous in the next few years, were all addressed " To the Honorable, the General Assemblies of Virginia and Maryland." [1] It was not as though two independent sovereignties had created separate corporations which now acted in partnership, but as though two sovereigns had joined in a partnership to create a single corporation.

Of the remaining nine corporations with charters from more than one state, five were canal companies, and four were toll bridge companies.

With these interstate corporations, and with the Bank of North America, and its successor under the Constitution, the Bank of the United States, it is interesting to compare another venture on a national scale, with which also Alexander Hamilton was closely associated, namely the Society for Establishing Useful Manufactures.[2] There seems little doubt that this corporation was designed by Hamilton as the concrete realization of the policy outlined in his Report on Manufactures, and that it was to be the beginning of manufacturing on a national scale, to be fostered by federal bounties and tariff privileges. The "S. U. M.," as the venture was generally known, was incorporated just two weeks before the Report was submitted to Congress. Hamilton's closest associates were openly concerned in its formation, and his advice and assistance, both private and official, were frequently obtained. An official letter on behalf of the directors of the corporation, to Hamilton, addressed him as " the founder of the institution." [3] It was by far the largest manufacturing venture yet floated in the states, and was generally referred to as the " national manufactory."

In a prospectus of the project, generally attributed to

[1] Pickell, 177.

[2] By far the fullest account of this Society is in the third of Mr. Joseph S. Davis' *Essays in the Earlier History of American Corporations.*

[3] Joseph S. Davis, I, 411.

Hamilton,[1] submitted to Jefferson in 1791, it was stated that "the subscribers should apply for an act of incorporation from the Legislature of the State of ——, and such other Legislatures as may be deemed necessary." But the plan of interstate incorporation was later abandoned. Federal bounties and privileges were also contemplated. It was charged in a contemporary newspaper that "it is currently reported that the Secretary of the Treasury is the patron of this institution, and that his ministerial influence is to be exerted to obtain from the general government, still more advantages, and exclusive privileges, for this select body of citizens, that they are to be incorporated, and they and all that is theirs are also to be exempted from the common burdens imposed by the general government." [2] But no Congressional charter was sought, probably because no doctrine of implied powers could extend so far. Instead, New Jersey was selected as the state of incorporation, partly for geographical reasons, and partly because there were no established rival manufactures to stir up hostility. Moreover (no small consideration), the leading members of the legislature were subscribers to the project.[3]

The charter, which was probably drafted by Hamilton,[4] makes no attempt to confer extraterritorial privileges. The provision, so common with modern corporations, granting power to do business in other jurisdictions than the incorporating state, is absent; the charter is expressly stated to be "for the Purpose of establishing a company for carrying on the Business of Manufactures *in this State.*" The privileges granted — exemption from all taxes for ten years, freedom of all employees from poll or occupation taxes, and from military duty except in cases of actual or imminent invasion,

[1] Joseph S. Davis, I, 352.

[2] *Ibid.*, 432. [3] *Ibid.*, 377.

[4] *Ibid.*, 378. The charter may be found in Paterson, *Laws of New Jersey*, 1800, 104–120. It is fully summarized in Davis, 378 ff.

authority to form a municipal corporation, and to cut canals and collect tolls, with powers of eminent domain — were confined to the state. The only special privilege which was sought to be exercised outside the state was the lottery privilege. The corporation was authorized in its charter " by one or more lotteries drawn within the state," to raise the sum of $100,000 to indemnify the society against initial losses. This privilege would be of little value, if the tickets could be sold only in New Jersey, and when the lottery was put in motion in 1794, determined efforts were made to establish selling agencies in the other states. In New York, the legislature was petitioned to grant liberty to sell the tickets, but the petition was refused. In the New England states, selling agents were offered one per cent on all tickets sold, but the prohibitory laws made this so risky, that it soon became necessary to raise the offer to $2\frac{1}{2}$ per cent. Even this was not enough, and the lottery was a miserable failure.[1]

Although the corporate privileges were, in legal form, thus strictly limited to the boundaries of the incorporating state, in its ordinary business activities the corporation naturally tended to transcend any artificial limits. Necessarily, purchases must be made and agents employed in other states. Loans were negotiated in New York, and machinery bought in Pennsylvania. But these transactions were hardly of sufficient extent to constitute an exercise of corporate functions outside of the state. The society did, however, finance a " Stocking Manufactory " in Philadelphia, but the legal form in which this branch establishment was clothed was that of a contract between two of the directors (signed on their behalf by Alexander Hamilton) and a Philadelphia agent named John Campbell, by which the directors were to advance the necessary funds, while Campbell bought the machinery, hired the labor, and superintended the business,

[1] Joseph S. Davis, I, 479.

keeping one third the net profits after his expenses had been reimbursed. On paper, the corporation nowhere figured in the transaction.[1]

The period covered in this chapter, closing with the beginning of the nineteenth century, contributed no logically formulated theory of the extraterritorial status of corporations. The theoretical aspects of the problem aroused no interest, and no published judicial decisions touch the matter. What lawyers thought on the problem appears only incidentally, as a by-product of debate, or among the records of legal instruments and transactions. It is certain that the Articles of Confederation did not insure corporations of one state recognition in the other states. Indeed Judge Baldwin has suggested that Article IV was purposely phrased to exclude any suggestion of such a claim.[2] The language of the article gives some color to the contention, and the strength of the popular fear of corporate monopolies makes such a design very probable. Beyond this the evidence, while on the whole pointing to a prevalent belief that a foreign corporation must obtain express recognition from the legislature before it will have a safe legal standing, is not entirely clear. The period did, however, make two important contributions toward the development of our subject. It contributed a political philosophy which tended to identify a corporation with the

[1] Joseph S. Davis, II, 485.

[2] Baldwin, *American Business Corporations before 1789*, 464. The text of the clause is as follows:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant."

privileges and monopolies with which it was endowed, a philosophy which, as a consequence, execrated corporations as encroachments on the citizen's natural right to freely exercise his faculties in trade and commerce. And it contributed a legal invention, of peculiarly American origin, by which two states could join in one act of incorporation, and create a body which was to all practical intents a single legal unit.

CHAPTER III

THE RULE OF COMITY

THE first third of the nineteenth century saw an extraordinary development of corporate activity. Insurance companies sprang up in many states. State banks were chartered in profusion. In the northern states, manufacturing corporations were set up, sometimes with exclusive privileges, more generally without. By slow degrees an inland transportation system developed, by means of turnpikes, stagecoach lines, ferries and canals, generally in the hands of state-created corporate monopolies, often lucrative, representing extensive private investment. Chancellor Kent tells how, in 1821, " to check the improvident increase of corporations," New York adopted a constitutional amendment requiring the assent of two-thirds of the legislature for the granting of any corporate franchise; yet at the very next session thirty-nine private corporations were formed.[1] In fortunate communities like Boston, of which Angell and Ames could say, in 1832, that " There is scarcely an individual of respectable character in our community, who is not a member of, at least, one private company which is incorporated," [2] it was natural that they should lose some of the extraordinary and fearsome attributes with which the imagination of more agrarian populations had clothed them. Inevitably, also, they came to assume business relations with persons in other states. Insurance companies assumed risks in other states.[3] Northern manufacturing com-

[1] 2 Kent Comm. (3d ed.), 271.

[2] Angell and Ames, *Corporations* (1st ed.), 35.

[3] As early as 1795, the Massachusetts Fire Insurance Company advertised that " they shall not in future confine their Business to the four Eastern States, but will receive proposals in State Street, and make insurance for any citizen of the United

panies sent their agents to the South to buy cotton.[1] Transportation companies bought supplies beyond state borders.[2] Moreover the economic era of corporate monopolies was already waning. Gibbons *v.* Ogden[3] made monopolies of navigation impossible. The Charles Rivèr Bridge case[4] exposed transportation monopolies on land to attack by the states. The new railroads were destroying the value of the old turnpike monopolies.[5] These were changes which the restrictive theory of foreign corporations could not survive.

One important monopolistic feature, however, corporations still retained, namely their corporate personality. Incorporation by special act was still the rule. Freedom of incorporation did not become general until the middle of the century.[6] The right to carry on business on the joint stock principle, with limited liability, was a valuable privilege, and while in most cases it no longer carried with it a right to exclude individual competitors, it was guarded against competition on the joint stock principle, except by permission of the legislature. Moreover the language and thought of the monopolistic era persisted. A corporation was still considered " restrictive of individual rights," its charter to be strictly construed for the protection of the public.[7] The conception of a charter as a contract, a grant by the state, so prominent at this time, was merely a phase of this philosophy

States." An Account of Early Insurance Offices in Massachusetts. In *Boston Insurance Library Association Reports*, 58.

Daniel Webster declared, in 1839, that the insurance made by corporations through agents in other states amounted to several millions. Argument in Bank of Augusta *v.* Earle, 13 Pet. 519, 561.

[1] See dissenting opinion of Justice McKinley, Bank of Augusta *v.* Earle, 13 Pet. 519, 600

[2] Argument of Ogden, *ibid.*, 526.

[3] 9 Wheat. 1 (1824). [4] 11 Pet. 420 (1837).

[5] See Taney, C. J., Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 551.

[6] See *post*, 67–68.

[7] Marshall, C. J., in Beaty *v.* Knowler, 4 Pet. 152 (1830). And see, of course, the Charles River Bridge case, *supra*.

— a conception, it should be added, which was not invented by Marshall in the Dartmouth College case.[1] It had been elaborately set forth by James Wilson many years before;[2] and by Thomas Paine before him,[3] and was, indeed, part of the stock in trade of lawyers at the beginning of the century.[4]

The first encroachment on the restrictive theory came almost imperceptibly, in the form of a recognition of the right of corporations to sue in the federal courts of other states than the one in which they were incorporated. Theoretically, to recognize a corporation in court outside the state in which it was created, is to overthrow the first principle of the restrictive system. It is the recognition of an artificial personality created by a foreign sovereign. That the recognition should be by a federal court does not change the matter. But the restrictive theory had not as yet been dogmatically expounded. The juristic conceptions on which it rests were not yet clearly grasped. And practically, the power to sue in a foreign jurisdiction is but a slight concession. It is not the exercise of one of those peculiar and exclusive corporate privileges which were considered "restrictive of individual rights." It does not infringe on any local monopolies which the state may have granted. With respect to suing, a foreign corporation is no different from a foreign individual. There might be a technical difficulty of proving the foreign incorporation; but the difficulty was not insuperable. As early as 1729, the Dutch West India Company had been allowed to sue in England,[5] and the case was known in America through Kyd.[6]

[1] 4 Wheat. 518 (1819).

[2] 1 Works, 565.

[3] Dissertations on Government, the Affairs of the Bank, and Paper Money. In Misc. Pamph., 730, Congressional Library.

[4] See, for instance, Pelatiah Webster, An Essay on Credit, in the same collection. And see Carey, *Debates*, 64.

[5] Dutch West India Company *v.* Henriques, 2 Ld. Raym., 1532; 1 Str. 612.

[6] The Law of Corporations (London, 1798), 292.

The matter was settled in the group of cases generally cited as Bank of United States *v.* Deveaux,[1] although, curiously enough, it was not in issue in any of them. The principal case was a suit by a federal corporation, and raised none of the theoretical difficulties which the restrictive system offered. Of course a federal court could recognize a federal corporation; it was only to bring the case within the constitutional grant of jurisdiction that the court resorted to the expedient of looking to the citizenship of the stockholders. The two other cases were suits against state corporations, brought by citizens of other states, in the state of incorporation.[2] Probably this circumstance explains why the case did not lead the court to any general theory of foreign corporations. There was nothing to lead any of counsel to argue such a theory. But the court's decision, that the court would look to the citizenship of the members of the corporation, and allow them to sue in their corporate names, necessarily applied to a state corporation as well as a federal one;[3] and this was accepted as the settled rule of the courts.[4]

The theory of these cases, it will be recalled, was not that a corporation was a citizen, within the meaning of the constitutional clause conferring jurisdiction on the federal courts, but that the individual citizens who composed it were entitled by that clause to sue in their corporate capacity. The argument applied as well, of course, where the members were all

[1] 5 Cranch, 61 (1809).

[2] Hope Insurance Co. *v.* Boardman, 5 Cranch, 57; Maryland Insurance Co. *v.* Wood. Not separately reported. See arguments in the Deveaux case, 77. See a further discussion of these cases, *post*, 54–57.

[3] There had, indeed, been a previous case apparently to this effect. Turner *v.* President and Directors and Company of the Bank of North America, 4 Dall. 8 (1799), a suit by a Pennsylvania corporation in North Carolina. Chief Justice Ellsworth said: "The action below was brought by the president and directors of the Bank of North America, who are well described to be citizens of Pennsylvania." But the matter was not argued and the court in the Deveaux case declined to consider the case an authority.

[4] Angell and Ames (1st. ed.), 212 ff.

aliens; and it was so applied by Justice Story, at circuit, in 1814, in a decision permitting the Society for the Propagation of the Gospel, an English corporation composed of high dignitaries of the Church of England, to bring suit.[1] The case is the more remarkable because the United States was then at war with Great Britain. A plea that the demandants were alien enemies was rejected, on the ground that it did not expressly aver that they were not licensed to reside in the United States. Nine years later another suit by the same corporation was carried up to the Supreme Court, and sustained.[2] In both of these cases, moreover, the suit was in ejectment, to recover land which had been forfeited by the legislature;[3] and the court in each case held the forfeiture void, under Article 6 of the treaty of peace of 1782, and Article 9 of the treaty of 1794.

In the state courts also suits by foreign corporations were allowed, without a dissent. The earliest case seems to have been Portsmouth Livery Co. *v.* Watson, in 1813.[4] A Rhode Island corporation brought trover in a Massachusetts court. To a plea that it was not incorporated in Massachusetts, there was a demurrer. Mellen, *arguendo*, "contended that a corporation was entirely indebted to the law for its existence; and this corporation, not having been created by our law, can have no legal existence here." But the court sustained the demurrer, observing that a corporation was an artificial person whose existence was to be established like any other material fact, and that the need of presenting proof of foreign law to establish it was no insuperable obstacle.

A few years later in Williamson *v.* Smoot,[5] the Supreme Court of Louisiana allowed an Alabama corporation to inter-

[1] Society for the Propagation of the Gospel *v.* Wheeler, 2 Gall. 104.
[2] Same *v.* New Haven, 8 Wheat. 464 (1823).
[3] See New Hampshire, Act of October 3, 1794.
[4] 10 Mass. 91.
[5] 7 Martin (La.), 31 (1819).

vene to protect its property against attachment by a creditor of one of its stockholders, the court expressly declining to "disregard the corporate fiction" though it originated with the legislature of another state.

In Silver Lake Bank *v.* North,[1] Chancellor Kent allowed a Pennsylvania bank to file a bill to foreclose a mortgage of New York land. To the argument that a foreign corporation could not be recognized, he replied: "I cannot see that the objection is even plausible. It is well settled that foreign corporations may sue here in their corporate name . . . ."

New York Firemen Insurance Co. *v.* Ely[2] was a suit by a New York corporation on a promissory note discounted by them. The suit was dismissed in an elaborate opinion by Chief Justice Hosmer, on the ground that the purchase was *ultra vires*; but the difficulty that the plaintiff was a foreign corporation seems to have occurred to neither counsel nor court.

In Lombard Bank *v.* Thorp (1826)[3] trustees appointed by the New Jersey legislature to wind up the affairs of a dissolved corporation were allowed to sue in New York. The court observed: "It was very properly conceded on the argument by counsel for the defendant that foreign corporations may sue here. Nothing is better settled."

Alabama also had in 1829 permitted suit by a Georgia corporation.[4] "In fact," the court said, "so far as our researches have extended, the question never seems to have been seriously agitated."

Finally, Bank of Marietta *v.* Pindall (1824)[5] and Bushel *v.* Commonwealth Insurance Co. (1827)[6] contained well-considered dicta to the same effect. And Angell and Ames, authors of the only American treatise on corporation law

[1] 4 Johns. Ch. 370 (1820).
[2] 5 Conn. 560 (1825).
[3] 6 Cow. 46 (1826).
[4] Lucas *v.* Bank of Georgia, 2 Stewart (Ala.), 147.
[5] 2 Rand. (Va.), 465 (1824).
[6] 15 S. & R. 173 (1827).

published at that time,[1] stated it to be settled law that a foreign corporation may bring suit.

This was the first step. The second was by no means so easy. Could a foreign corporation transact business within the state, to the extent of making an enforceable contract? Continental jurists draw a careful distinction between what are called civil, and functional capacities of a corporation, its "*Rechtsfähigkeit*" and "*Zwecktätigkeit*," or "*activité juridique*" and "*activité sociale*."[2] Obviously the functional capacity of a corporation, the social object for which it was created, its *business*, concerns the sovereign in whose territory this function is exercised much more vitally than does the bare performance of a legal act, like instituting a suit. It brings the foreign corporation directly in competition with local business interests. The problem was presented to the court in the group of cases known under the title of Bank of Augusta *v.* Earle.[3] The opinion in those cases, rendered in Chief Justice Taney's best vein, has generally been looked upon as the original fountain head of the law of foreign corporations in America. The terse and quotable style of the opinion, its philosophical flavor, and its clear-cut reasoning combined to give even the dicta of the Chief Justice an authority which was to stand unquestioned for half a century. The case merits a careful study.

The case was, in a measure, an aftermath of Andrew Jackson's mortal combat with the Bank of the United States. The bank succumbed, it will be recalled, in 1836. It had, during the past twenty years, undertaken a growing volume of lucrative business in bills of exchange, purchasing them, at a discount, at its branch offices throughout the United States.[4]

[1] Corporations, 209.

[2] Young, 46. Pillet, 96. Mamelok, 59.

[3] 13 Pet. 519 (1839).

[4] Dewey, State Banking before the Civil War (1910), 167 ff.; National Monetary Commission, Sen. Doc. 581, 61st Cong., 2d Sess.

This business now fell into the hands of the state banks; and the question at once arose whether they could legally carry on this business through agencies in other states. Three banks, the Bank of Augusta, incorporated in Georgia, the Bank of the United States, which had procured a Pennsylvania charter after losing its federal one, and the New Orleans and Carrollton Railroad Company, a Louisiana corporation with banking powers, had appointed agents in Alabama. The makers of certain bills of exchange which the agents had there purchased refused to pay them, and the banks brought suit in the federal circuit court in Alabama. Mr. Justice McKinley, sitting at circuit, dismissed the suits in each case, on the ground that the corporations could not exercise banking powers outside their own state.

The cases went up together to the Supreme Court, and were argued by an imposing array of counsel, including Webster, Sergeant, Ogden, and Ingersoll. The arguments assumed the broadest scope. The view that a corporation, from the very nature of its being, cannot act beyond the confines of the state which created it, was forcefully urged by Ingersoll. Will the court, he asked, assume the responsibility of *creating* a corporation in Alabama, when the legislature of Alabama has not seen fit to give it a franchise? Have the courts, especially have the federal courts, the power to make laws by comity? "Is it not, at all events, a perilous faculty for comity to make common law for one state from the written law of another?"

Taney's way out of the theoretical difficulty was by an ingenious combination of confession and avoidance. He said:

> It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its

being in that state alone, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of The United States *v.* Amedy, 11 Wheat. 412, and in Beaston *v.* The Farmers' Bank of Delaware, 12 Pet. 125. Now natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by the laws of the place ?

The geographical difficulty thus met, there remained only the problem of recognition. Would the courts administering Alabama law recognize this corporate entity, situated as it was beyond the border, and deriving its being from foreign law ? Here Taney found, ready for use, the doctrine of comity. Drawn from the Dutch jurists,[1] this convenient theory had been expounded five years ago by his colleague, Mr. Justice Story, in his " Conflict of Laws."[2] It is true, Story had reasoned, that no country is legally bound by the laws of another sovereign. Yet on grounds of convenience, and " from a sort of moral necessity to do justice in order that justice may be done to us in return," nations do in fact give effect to each others' laws. Moreover, and here the doctrine had its practical consequences, " In the silence of any positive rule, affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests."

[1] See Beale, *Conflict of Laws*, § 71.

[2] Story, *Conflict of Laws* (1st. ed.), § 35 (1834).

Story was discussing the comity of nations. But Taney had little difficulty in showing that at least as high a degree of comity prevailed among the states of the Union. Presumptively, therefore, the law of incorporation of the various plaintiff corporations had been "adopted" by the state of Alabama, and the existence of the legal entity could be recognized by courts in Alabama.

While the arguments and the opinion took this broad scope, the real contention between the parties may be brought within much narrower limits. If Ingersoll really meant to rest his case on the proposition that a court could never recognize the existence of a foreign corporation, he was foredoomed to failure, in view of the many prior state cases allowing foreign corporations to sue. Alabama itself, the state on whose behalf the doctrine of nonrecognition was urged, had extended the hospitality of its courts to these foreign entities.[1] Perhaps the old confusion between the special privileges of a corporation and its corporate character had some influence in leading the court into this broad survey. For when counsel argued that the legislature could not grant a franchise effective beyond state limits, what was doubtless primarily in their minds was the franchise to carry on banking, not the franchise to be a corporation. Banking, at this time, was looked upon as a special and valuable privilege, to be conceded by the legislature to favored individuals.[2] As early as 1799, Massachusetts and New Hampshire had prohibited private banking. In 1804, New York forbade banking by unincorporated firms. In 1808 Pennsylvania enacted that no foreign banking corporation should establish a branch or agency within the state. "In 1830" we are told, "practically all states had confined the right of issue to incorporated banks."[3] Some of the laws applied only to note

[1] *Supra*, 41.
[2] See Dewey, *op. cit.*, 144 ff.
[3] *Ibid.*, 150.

issues, but many were broader.[1] Maine, in 1836, forbade keeping any office or agency for dealing in the notes, bills, etc., of any foreign banking corporation.[2] The policy of this legislation seems to have been to preserve to the state banks a monopoly in a lucrative business. Thus in Alabama itself, the constitution authorized the legislature to establish one state bank, with as many branches as the legislature should by a two-thirds majority permit, provided that at least two-fifths of the stock must be reserved to the state. By implication, all other banks were prohibited. Under this provision, seven branches had been established, five of them completely owned by the state, and these banks had been so profitable that for ten years all the expenses of the government had been met without direct taxation. The state Supreme Court had declared that "since the adoption of the constitution banking in this state is to be regarded as a franchise."[3]

That such a franchise could not be violated by another sovereignty the courts had frequently proclaimed. In Pennington *v.* Townsend,[4] the Supreme Court of New York had held invalid the notes of a New Jersey bank issued at an office in New York. "Yielding to the legislature of New Jersey the powers claimed under this corporation, to wit, that this bank be put upon the same footing in conducting their banking operations as our own banks, would be surrendering at once to them a power to make laws coextensive with our own legislature." In Bank of Marietta *v.* Pindall,[5] the power of a foreign bank to issue a note in Virginia had been denied. An Ohio corporation was the plaintiff, and the complaint was met with a demurrer, on the ground that the foreign corporation could not sue, and a special plea that the

[1] See Act of February 14, 1820 in Kentucky.
[2] Ch. 231, Public Acts, 1836.
[3] State *v.* Stebbins, 1 Stewart (Ala.), 299 (1828).
[4] Pennington *v.* Townsend, 7 Wend. 976 (1831).
[5] 2 Rand. (Va.), 465 (1824).

note was made by the defendants, and endorsed by the payees, in Virginia. The demurrer was overruled, on principles of comity. The plea was also held bad, on a very scrupulous nicety of pleading, but the court clearly thought the notes were invalid. The court said:

> We claim no power to create corporations for carrying on banking operations beyond our own limits. But it is our policy to prevent other nations and states, and the corporations of other nations and states, from doing that towards us which we forbear to do towards them. It is our policy to restrain all banking operations by corporations not established by our own laws. It would not, therefore, be permitted to a bank in Ohio to establish an agency in this state, for discounting notes, or for carrying on any other banking operations; nor could they sustain an action on any note thus acquired by them.

The precise question, as it was presented to the Supreme Court in Bank of Augusta *v.* Earle, was, then, whether the banking franchise of the Alabama state bank included the exclusive right to employ corporate capital in the purchase of bills of exchange within the state. It was freely admitted that no foreign corporation could establish a branch bank within the state.[1] It was admitted on the other side that the banking privilege did not exclude private individuals from buying bills of exchange in Alabama.[2] But Justice McKinley, in his dissent in the Supreme Court, maintained earnestly that " it was the intention to exclude all accumulated bank capital which did not belong to the state, in whole or in part, from dealing in exchange." Despite the wide range of the arguments and opinions, the case ultimately turned on this narrow issue. A careful review of Alabama banking legislation convinced the court that the state had not sufficiently expressed the intention of prohibiting such transactions to rebut the presumption raised by the doctrine of comity.

The actual decision in the case of Bank of Augusta *v.* Earle, that a foreign banking corporation could buy a bill of ex-

[1] Webster's argument, 13 Pet. 549; Ogden, 527. [2] Justice McKinley's dissent, 603.

change through Alabama agents, was almost immediately set at nought by the Alabama legislature.[1] And the broader proposition set forth, that presumptively any foreign corporation will be recognized by the courts without legislative mandate, was already an integral part of American law. The court did not grasp this occasion, as it might well have done, to lay down, or even consider, the distinction on which foreign jurists have laid so much stress, between functional and civil capacities. Where, then, lies the importance of the case? The influence of the case on the later growth of the law of foreign corporations springs rather from what was said by Chief Justice Taney than from what the court decided. These dicta resolve themselves into three propositions:

1. The court rejected Webster's argument that a foreign corporation was entitled to the protection of the privileges and immunities clause of the Constitution, and it refused to extend the device employed by Marshall in Bank of United States *v.* Deveaux of looking through the corporate entity to the citizenship of the corporators. This position the court has ever since adhered to, and it is perhaps the chief cause of the anomalous constitutional status of foreign corporations today.

2. The court conceded, in the striking language which I have quoted, the geographical theory of the non-existence of the corporation outside the boundaries of the state of its origin. This theory was to place serious difficulties in the way

[1] Only a few months later it enacted that: "Whereas, sundry foreign corporations, have been in the habit of exercising the banking privileges conferred upon them by other states or countries, by purchasing bills of exchange, or by discounting promissory notes, within the State of Alabama, in violation of the sovereignty and right of the said State, and against the true policy and interest thereof; therefore,

"Be it enacted," etc., "That . . . it shall not be lawful for any corporation invested with the privileges of banking, and the authority of discounting bills of exchange and promissory notes, by any state, other than the State of Alabama to exercise such privileges by agent or otherwise within the limits of the State of Alabama." *Laws*, 1839–1840, 69.

of suits against foreign corporations doing business in the state, and its effect was only circumvented by an artificial and cumbersome theory of implied consent to extraterritorial service.

3. The court emphatically proclaimed the constitutional power of a state to repudiate the principle of comity, and not only to refuse recognition to a foreign corporation, but to prevent its transacting any sort of business within the state. This dictum was adhered to, even after the adoption of the Fourteenth Amendment, and it has resulted in endless conflicts between legislatures and foreign corporations and a long course of hard-fought litigation.

The influence of these three dicta will be seen at every stage of the eventful history of the law of foreign corporations, from 1839 to the present day.

CHAPTER IV

THE CITIZENSHIP OF A CORPORATION

FEW chapters in American judicial history have been as unsatisfactory as that which treats of the status of corporations under the provision of the Constitution which declares that " the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," [1] and that which confers on the federal courts jurisdiction over suits between " citizens of different states." [2] Marshall, Taney, Field, these are only a few of the illustrious judges who have at different times sought to lay the matter at rest; yet again and again the court has been called upon to reexamine its previous position, and even today the matter is not definitely concluded. The difficulty has probably been inherent in the subject. In construing provisions of such bold generality, the policy and general purposes of the Constitution are far more valuable criteria than the literal language. The task of the Supreme Court has been to examine the political and economic nature of corporate groups, and to determine with respect to each clause whether beings of that character come within its policy. During the century or more in which it has struggled with this task, however, corporations themselves have undergone a gradual but fundamental revolution. The name remained the same; but it was the changing substance to which the courts must look in interpreting the policy of the Constitution. This changing substance was the element which made for growth and development. But precedents have a way of attaching themselves to names rather than to things, and when cases follow each other in relatively short succession, the point at

[1] Art. IV, § 2, Clause 1. [2] Art. III, § 2.

which a change of substance has made the precedents inapplicable is overlooked. Such a conflict between substance and form could not bring harmonious and orderly development.

That there was nothing in the use of the word " citizen " in the constitutional clauses to exclude corporations from their benefits, is amply clear. There were English precedents, known to American students of Coke, holding that a corporation could be an " inhabitant " and an " occupier " within the meaning of a statute.[1] It had been frequently referred to as a " person." [2] International lawyers have had no difficulty in ascribing citizenship or nationality to a corporation, and have bestowed vast amounts of learning on the various modes of ascertaining it.[3] A corporation may be an " alien enemy " subject to the usual disabilities in time of war. Story had enunciated this doctrine as early as 1814:[4]

In general, an aggregate corporation is not in law deemed to have any commorancy, although the corporators have; yet there are exceptions to this principle; and where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile, it may, for some purposes at least, be clothed with the same character.

[1] Commenting on the statute which provided that " the inhabitants of the said shires " should be charged with keeping bridges in repair, Coke said: " Every corporation and body politick residing in any county, riding, city or towne corporate, or having lands or tenements in any shire, riding, city, or towne corporate, *quae propriis manibus et sumptibus possident et habent*, are said to be inhabitants there within the purview of this statute." 2 Inst. 703. Lord Mansfield, in Rex *v.* Gardner, 1 Cowp. 78 (1755) held that a corporation was liable to assessment under the poor laws, as an " inhabitant or occupier."

[2] 1 Kyd, 15. A penal statute relating to the erection of cottages declared that " no person shall . . ." etc. Lord Coke says of it: "This extends as well to persons politick and incorporate as to naturall persons whatsoever." 2 Inst. 736.

[3] Mamelok, 211; Pillet, 118–160; Young, 110–168; Arminjon, *Nationality of Corporations* (Spear's transl.) *passim*. Congress of Joint Stock Companies, Paris, 1889, Art. 21: " Every company has a nationality."

[4] Society for the Propagation of the Gospel *v.* Wheeler, 2 Gall. 105, 131. Accord, The Vigilantia, 1 Rob. 1 (1798).

A corporation may be a "subject" and as such entitled to registry under the British navigation laws.[1] It may even be a "loving subject" within the meaning of a colonial grant.[2] Story held that a British corporation was an English subject, within the meaning of the treaty clause providing that English subjects should not be regarded as aliens, with respect to legal remedies regarding land held by them in the United States.[3] Under international treaties a corporation is very frequently treated as a citizen.[4] The Danish-French treaty of 1910 has a clause in substance identical and in language closely similar to the privileges and immunities clause of the Constitution: "Danish subjects in France, and French citizens in Denmark, in all that concerns the exercise of civil rights as well as in the exercise of trades and professional or industrial pursuits, shall enjoy the same rights, privileges, liberties, favors, immunities and exemptions as are accorded to nationals." M. Pillet considers it clear that the clause includes corporations.[5] Corporations are entitled to diplomatic protection from the state in which they are established, whether or not they are entirely made up of individual citizens of that state, and for this purpose it is the general custom to speak of their citizenship.[6] Where the word "citizen" or an analogous term has occurred in American legislation, it has frequently been held to include corporations. Thus the Captured and Abandoned Property Act, after the Civil War, permitted suits before the Court of

[1] Queen *v.* Arnaud, 9 Q. B. 806 (1846). "Under the operation of this principle," says Judge Baldwin, "no inconsiderable part of the British merchant marine is now virtually owned by Americans." In *Two Centuries of American Law*, 289.

[2] Vermont *v.* Society for the Propagation of the Gospel, 1 Paine, 652 (1826); 2 Paine, 545 (1827). Perhaps a reluctance to disturb established titles contributed to this holding.

[3] Society for the Propagation of the Gospel *v.* Wheeler, 2 Gall. 105 (1814). And see Same *v.* New Haven, 8 Wheat. 464 (1823). Lord Thurlow called a corporation a "subject" in Nabob of Arcot *v.* East India Company, 3 Bro. C. C. 303 (1791).

[4] Pillet, 175. Mamelok, 50.

[5] Pillet, 175.

[6] Borchard, Diplomatic Protection of Citizens, § 282.

Claims by all persons who had not given aid and comfort to the rebellion, and who would bear true faith and allegiance to the Union. The law was held to authorize suits by corporations.[1] The French Spoliation Act of 1885 conferred on the Court of Claims authority to adjudicate claims of "citizens of the United States or their legal representatives." This was held to include corporations.[2] An Act of March 3, 1887, provided machinery for perfecting titles to government lands illegally appropriated by railroad companies, "where any said company shall have sold to citizens of the United States or to persons who have declared their intention to become such citizens." The Supreme Court considered it quite obvious that corporations could take advantage of the act.[3] Another statute authorized suits with respect to "all claims for property of citizens of the United States" destroyed by Indians; and this also was held to include corporations.[4] Yet another statute threw the mineral lands of the United States open to citizens of the United States; and it was held that a corporation could locate a claim as a citizen.[5] Congress authorized the Postmaster-General to make contracts for the carriage of mail on vessels owned and officered by citizens of the United States; and an opinion by Mr. Taft, then Acting Attorney-General, holds that vessels owned by American corporations come within its purview.[6] Finally the Spanish Treaty Claims Commission, established at the close of the Spanish war, was given jurisdiction to adjudicate "all claims of citizens of the United States against Spain." After the most elaborate argument by eminent lawyers, the Com-

[1] United States *v.* Insurance Companies, 22 Wall. 99 (1874).

[2] See 26 Stat. 905, 907. Per White, J., in United States *v.* Northwestern Express Company, 164 U. S. 686, 689 (1897).

[3] Ramsey *v.* Tacoma Land Company, 196 U. S. 360 (1905).

[4] United States *v.* Northwestern Express Company, 164 U. S. 686 (1897).

[5] North Noonday Mining Company *v.* Orient Mining Company, 1 Fed. 522 (1880). McKinley *v.* Wheeler, 130 U. S. 630 (1888).

[6] 20 Opinions Attorney-General, 161.

mission held that American corporations could prosecute claims, regardless of the citizenship of the stockholders.[1]

These cases are cited to show that the legal mind has encountered no difficulty in bringing corporations within the meaning of the term " citizen," wherever the general purpose and context of the language permitted such a construction. For over a century, however, despite persistent litigation, the Supreme Court has refused to concede to corporations any constitutional protection under the privileges and immunities clause of the Constitution, on the ground that corporations were clearly not citizens, in the sense in which the word is there used. Since the literal language is not conclusive, the courts must have conceived that to bring corporations within the clause would have entailed legal consequences inconsistent with its purpose, and with the policy of the Constitution as a whole. It is necessary to consider the decisions in some detail to discover the grounds on which this belief rested.

A corporation was first declared not to be a citizen in the cases already alluded to,[2] generally known under the name of Bank of United States *v.* Deveaux.[3] It is interesting to note how these cases were presented to the court. Attention was primarily centered on the Deveaux case. The plaintiff was the most powerful corporation in the United States, and its status and privileges were the subject of the most bitter political contention. In the other cases, involving state

[1] See Special Report of William E. Fuller. In these cases the Commission awarded full damages, without deductions on account of foreign stockholders. See Borchard, § 282.

Thompson states the rule of construction as follows; " The general rule is that where a constitution or statute grants a right, requires a duty, or imposes a liability upon any person, citizen or resident, it applies to corporations, as well as to natural persons, if they are within the reason and the purpose of the provision." Corporations, I, § 11.

[2] *Supra*, 39.

[3] Bank of United States *v.* Deveaux, 5 Cranch, 61; Maryland Insurance Company *v.* Wood, *ibid.*, 78; Hope Insurance Company *v.* Boardman, *ibid.*, 57.

insurance companies, no separate opinions were filed; they were looked upon as side issues. It was only in those cases, however, that the question of citizenship was seriously in issue. The Bank of the United States was a federal corporation, and it was nowhere contended that it was a citizen of any state. The powerful argument of its counsel, Horace Binney, relied throughout on the citizenship of the corporators, and the corporation was looked upon as no more than a group of legal faculties held by them in common.[1] Key, who argued against the bank, insisted that the court could not look beyond the corporate entity: "But the name of a corporation is not a mere accident. It is *substance.* It is the *knot* of its combination. It is its *essence.* It is *the thing itself.*"[2] Of the state insurance companies, one was averred to be "The Maryland Insurance Company, citizens of the state of Maryland," and counsel for this company contended not that the corporation was a citizen, but that the averment signified that the members were. "The corporate body is the *form* under which the privilege is enjoyed and exercised. The individuals are the *substance.*"[3] Ingersoll, who supported him, went out of his way to attack the contention that a corporation could be a citizen.[4] In all this array of counsel only one, the representative of the Hope Insurance Company, appears to have contended that a corporation could sue as a citizen in its own right.[5] It is not surprising that Marshall denied the citizenship of the corporation so curtly:

"That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a

[1] Bank of United States v. Deveaux, 5 Cranch, 64.
[2] *Ibid.*, 75. [3] *Ibid.*, 79. [4] *Ibid.*, 83. [5] *Ibid.*, 59.

company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union. . . . That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other." He then developed the argument of Binney, that the corporators, by virtue of their own citizenship, could sue in their corporate name. Marshall's treatment of the English cases, holding that a corporation could be an "inhabitant" or "occupier" within the meaning of an statute, is curious: "It is true," he said, "that as far as these cases go they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favor of considering the corporation itself as endowed for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect, when they use the name of the corporation, for the purpose of asserting their corporate rights. Still, the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially." The court recognized, then, that the authority on which counsel largely relied made for the contention of the Hope Insurance Company rather than against it.

Why, then, did the court consider the contention so obviously wrong? The answer lies, I believe, in the fear that to ascribe citizenship to a corporation would give it rights, under the privileges and immunities clause, which would place corporations above the state. Corporations were still especially in the South, looked upon with fear and disfavor. Everywhere they were considered unusual and extraordinary privileges, bestowed by legislative grant on favored individuals. To say that a corporation is a citizen, probably

meant to the court to put it on a parity with individual citizens, with the same privileges of egress and ingress, of trade and commerce. It would have enabled the North to force its corporations on Southern states whose policy was against the existence of any corporations within their boundaries. To persons familiar with the political passions which the bank controversies had aroused, it must have been apparent that such a doctrine would have seriously imperilled the Union.

In the next group of cases in which the citizenship of a corporation was denied, reported as Bank of Augusta *v.* Earle,[1] the Bank of the United States was again a party; but it had now become a state institution, and state citizenship had become a vitally important matter. Among counsel, Ogden and Sergeant went no further than to urge the doctrine of comity; but Daniel Webster based his argument squarely on the privileges and immunities clause of the Constitution. It is worth careful examination:[2]

> That this article in the Constitution does not confer on the citizens of each state political rights in every other state, is admitted. A citizen of Pennsylvania cannot go into Virginia and vote at an election in that state; though when he has acquired a residence in Virginia and is otherwise qualified as required by her constitution, he becomes, without formal adoption as a citizen of Virginia, a citizen of that state politically. But for the purposes of trade, commerce, buying and selling, it is evidently not in the power of any state to impose any hindrance or embarrassment, or lay any excise, toll, duty or exclusion upon citizens of other states, to place them, coming there, upon a different footing from her own citizens.
>
> There is one provision then in the Constitution by which citizens of one state may trade in another without hindrance or embarrassment.
>
> There is another provision of the Constitution by which citizens of one state are entitled to sue citizens of any other state in the courts of the United States.
>
> This is a very plain and clear right under the Constitution; but it is not more clear than the preceding.

[1] 13 Pet. 519 (1839). The facts are stated *supra*, 42–43. [2] *Ibid.*, 552.

Here then are two distinct constitutional provisions conferring power upon citizens of Pennsylvania and every other state, as to what they may do in Alabama or any other state: citizens of other states may trade in Alabama in whatsoever is lawful to citizens of Alabama; and if, in the course of their dealings they have claims on citizens of Alabama, they may sue in Alabama in the Courts of the United States. This is American, constitutional law, independent of all comity whatever.

By the decisions of this Court it has been settled that this right to sue is a right which may be exercised in the name of a corporation. Here is one of their rights, then, which may be exercised in Alabama by citizens of another state in the name of a corporation. If citizens of Pennsylvania can exercise in Alabama the right to sue in the name of a corporation what hinders them from exercising in the same manner this other constitutional right, the right to trade? If it be the established right of persons in Pennsylvania to sue in Alabama in the name of a corporation, why may they not do any other lawful act in the name of a corporation? If no reason to the contrary can be given, then the law in the one case is the law also in the other case.

It will be noted that Webster's contention was not that a foreign corporation was entitled to equality of treatment with domestic corporations. His argument was that so long as individual citizens in Alabama could carry on business, individual citizens of Pennsylvania could do the same, whether they acted in their individual capacity or through the medium of a corporation. It was in this sense that the court understood him. Chief Justice Taney stated the argument to be that: "If, in this case, it should appear that the corporation of the Bank of Augusta consists altogether of citizens of the state of Georgia, that such citizens are entitled to the privileges and immunities of citizens in the state of Alabama, and as the citizens of Alabama may unquestionably purchase bills of exchange in that state, it is insisted that the members of this corporation are entitled to the same privilege, and cannot be deprived of it even by express provisions in the Constitution or laws of the state."

This contention the court rejected, with logic that seems irrefutable. After stating and reaffirming the principle of the Deveaux case, Taney continued:

> But the principle has never been carried any farther than it was carried in that case; and has never been supposed to extend to contracts made by a corporation; especially in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state; and corporations would be chartered in one to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members. The only rights it can claim are the rights which are given it in that character, and not the rights which belong to its members as citizens of a state.

Chief Justice Taney's dictum, then, was only that a state could deny to foreign corporations privileges which it conferred on its own individual citizens. Whether a state which granted to its own citizens freely the privilege of doing business in corporate character, could deny that privilege to citizens of another state was not considered. Webster did

not base his argument on any such ground. Indeed he could not, for Alabama did not allow freedom of incorporation for banking purposes. Far from it; the state constitution expressly limited the formation of banking corporations even by special charter. General incorporation laws were at that time almost unknown.

The device sanctioned in Bank of United States *v.* Deveaux, of basing the jurisdiction of the federal courts on the citizenship of the corporators, was abandoned in Louisville Railroad Company *v.* Letson,[1] in which several intervening decisions denying jurisdiction where members of the corporation were citizens of the same state as that of the adversary party were expressly overruled.[2] The court placed its decision squarely on the ground " that a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued." [3]

It was not long, however, before the court recoiled from this bold step. In Rundle *v.* Delaware and Raritan Canal Company,[4] the majority reaffirmed that decision without comment. Justice Catron concurred, but on the ground that

[1] 2 How. 497 (1844).

[2] Sullivan *v.* Fulton Steamboat Company, 6 Wheat. 450 (1821); Breithaupt *v.* Bank of Georgia, 1 Pet. 238 (1828); Commercial and Rail Road Bank *v.* Slocomb, 14 Pet. 60 (1840); Kirkpatrick *v.* White, 4 Wash. C. C. 595 (1826); Bank of Cumberland *v.* Willis, 3 Sumner, 472 (1839).

[3] 2 How. 497, 558. See also 555 and 559, where it is again stated that the corporation itself is a citizen.

[4] 14 How. 80 (1852).

it is the citizenship, not of the corporation, nor of the stockholders, but of the president and directors, that is significant. Justice Daniel dissented in an opinion which scathingly arraigned the decision in both the Deveaux and the Letson cases. The proposition that a corporation was a citizen was, he said, startling "either to the legal or political apprehension." Quoting Vattel and Blackstone, he insisted that the term could apply only "to man in his individual character, and to his natural capacities; to a being, or agent, possessing social and political rights, and sustaining social, political and moral obligations." All citizens stand alike before the law. "As a citizen, then, of a state, or of the United States, a corporation would be eligible to the State or Federal legislatures; and if created by either the State or Federal governments, might, as a native-born citizen, aspire to the office of President of the United States — or to the command of armies, or fleets, in which last example, so far as the character of the commander would form a part of it, we should have the poetical romance of the spectre ship realized in our Republic. And should this incorporeal and invisible commander not acquit himself in color or in conduct, we might see him, provided his arrest were practicable, sent to answer his delinquencies before a court-martial, and subjected to the penalties of the articles of war."

This appalling vision seems to have affected the court. For the following year, in Marshall *v.* Baltimore and Ohio Railroad Company,[1] while affirming once more the jurisdiction of the federal courts, the reasoning was completely shifted. That a corporation cannot be a citizen, the court said, cannot be denied. The right to sue must be based on the citizenship of the members:

> In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of a numerous association to

[1] 16 How. 314 (1853).

sue and be sued. "And this corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation." Bank of Augusta *v.* Earle, 13 Pet. 512. The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the state which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there, and can find them there and nowhere else.

This extraordinary application of Chief Justice Taney's geographical theory was made, it should be added, in a case in which the corporation had itself built a line into another state, and in a litigation which arose in that foreign state! It is not surprising that Mr. Justice Daniel, who called the Deveaux case "ignis fatuus No. 1" and the Letson case "ignis fatuus No. 2," should have considered the decision in the Marshall case "the chef d'oeuvre amongst the experiments to command the action of the spirit in defiance of the body of the Constitution."[1]

That the court should resort to such a violent fiction to sustain the jurisdiction, indicates two things: A strong conviction that the spirit and purpose of the Constitution required them to give corporations the rights of citizens in the federal courts; and a profound aversion to reaching such a result by the simple and direct method of calling a corporation a citizen. It is not difficult to trace the source of this aversion. The careful and candid dissenting opinion of Mr. Justice Campbell makes it clear.[2] The decision in the Letson case had given rise to much apprehension. It had been taken to mean that a corporation had in every respect the rights of individual citizens. "The interdependence between the sections of the Constitution which defined the

[1] Dissent, 344. [2] *Ibid.*, 347.

privileges and immunities of citizens of the Union, and the jurisdiction of the federal courts in controversies between citizens of the states, was known and felt." Daniel Webster, Chief Justice Jones, of New York, and other eminent jurists had expressed the opinion that the dictum in Bank of Augusta *v.* Earle, that a corporation was not a citizen, was no longer law.[1] State courts had shown a strong hostility to the supposed innovation. The Supreme Court of Kentucky had given solemn warning of its possible consequences: "The apparent reciprocity of the power would prove to be a delusion. The competition for extraterritorial advantages would but aggrandize the stronger to the disparagement of the weaker states. Resistance and retaliation would lead to conflict and confusion, and the weaker states must either submit to have their policy controlled, their business monopolized, their domestic institutions reduced to insignificance, or the peace and harmony of the states broken up and destroyed."[2] Only seven years before the Civil War, an appeal of this nature touched a sensitive spot. Already the rights and privileges of citizenship, under the Constitution, had become a subject of bitter political controversy; the Dred Scott decision, that a free negro was not a citizen, was only three years distant.[3] Between the strong conviction that the genius of the Constitution called upon them to sustain their jurisdiction and this equally strong fear of encroaching on the rights of the states, no rational reconciliation seemed at that time possible. A presumption contrary to fact seemed the only way of reconciling them.

Two years later the doctrine of the Marshall case was reaffirmed.[4] "The averment," the court said, "that the company is a citizen of the State of Indiana, can have no

[1] 3 Zabr. 429, 435, 436. See *post*, ch. VI.

[2] Commonwealth *v.* Milton, 12 B. Mon. 212 (1851).

[3] Dred Scott *v.* Sandford, 19 How. 393 (1856).

[4] Lafayette Insurance Company *v.* French, 18 How. 404 (1855).

sensible meaning attached to it. This court does not hold, that either a voluntary association of persons or an association into a body politic, created by law, is a citizen of a state within the meaning of the Constitution." But the allegation "that the defendants are a corporation, created under the laws of the State of Indiana, having its principal place of business in that state," was held sufficient to give the federal court jurisdiction. And again in 1857, jurisdiction was sustained on the presumption that the corporators were all citizens in the same state.[1] "No one, we presume," said Chief Justice Taney, "ever supposed that the artificial being created by an act of incorporation could be a citizen of a state in the sense in which that word is used in the Constitution." In this case a description of the defendants as "The Covington Drawbridge Company, citizens of the State of Indiana," was held sufficient to give jurisdiction.

Paul *v.* Virginia[2] set at rest any doubts which these cases relating to jurisdiction might have aroused, the court announcing in a unanimous decision that a corporation was not entitled to the protection of Article IV, Section 2, of the Constitution. As the case is itself the starting point of a line of decisions which call for consecutive treatment, a fuller consideration of facts and opinion is reserved for another chapter.[3] As will there appear, the holding on this point was not necessary to a decision of the case, since the statute complained of was not really discriminatory. The matter was thoroughly examined on principle, however, and the reasons given are worth careful examination.

The court first denied, on authority, the contention that the corporation itself could be a citizen. "The term citizens, as there used, applies only to natural persons, members of the body politic, owing allegiance to the state." It then pro-

[1] Covington Drawbridge Company *v.* Shepherd, 20 How. 227 (1857).
[2] 8 Wall. 168 (1868). [3] Ch. VI, *post*.

ceeded to " withdraw the veil " and examine the privileges of the stockholders:

But the privileges and immunities secured to citizens of each state in the several states, by the provision in question are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided), from individual liability. . . .

If the right asserted of the foreign corporation, when composed of citizens of one state, to transact business in other states, were even restricted to such business as corporations of those states were authorized to transact, it would still follow that those states would be unable to limit the number of corporations doing business therein. *They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other states to engage in the same pursuits.* They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the state should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.

I have italicized an exceedingly significant sentence. Mr. Justice Field was still speaking and thinking in terms of corporations created by special act, by charters conferring special and unusual privileges. Only two alternatives pre-

sented themselves to him, if the corporation were brought within the clause of the Constitution: either the state must place corporations on an equality with individual citizens, or it must admit all foreign corporations to a given business, whenever it created a single corporation for that purpose by special act. In an economic stage in which corporations were regarded as peculiar and exclusive favors bestowed on the chosen few, either alternative would have been impossible. We have seen how deeply ingrained in the history of American corporation law was this conception, how Jefferson identified incorporation with the grant of patents and copyrights, how Marshall regarded the exercise of every corporate franchise as "restrictive of individual rights," how a corporation was denounced as a "monopoly on the great charter of mankind." [1] This conception dominated the corporation law of the eighteenth and early nineteenth centuries, determined its phraseology and shaped its definitions. It is not surprising that judges who learnt their law in the period in which this theory was in accord with the facts, should carry over its terminology and its conceptions into an era in which the facts had changed.

Perhaps the very phraseology of the constitutional provision contributed to the court's unwillingness to bring corporations within its protection. The words "privileges and immunities" are precisely the words which had always been used to describe the peculiar and exclusive franchises of a corporation. They were used to describe the exclusive trading rights of merchants in the great commercial corporations,[2] to the domestic monopolies granted by the English Crown,[3] to the special feudal exemptions granted to municipal cor-

[1] *Supra*, 19.

[2] See John Wheeler's description of the Merchant Adventurers, in 1606, quoted in 2 Davis, *Corporations*, 77.

[3] See the charter of a mining company granted, in 1568, by Queen Elizabeth, printed in Bland, Brown and Tawney, 427.

porations,[1] to the sacred rights secured by colonial charters,[2] as well as to the franchises and rights of corporations generally.[3] The New Hampshire bill of rights secured the "privileges and immunities" of the people; the charter of Dartmouth College conferred upon it "privileges and immunities," and Daniel Webster had argued that the identity of language made it clear that the Constitution protected the charter.[4] While it is of course clear that in Article IV, Section 2, the words are not used in this sense, it is not at all unlikely that the identity of phraseology helped to lead the court to the assumption that to apply the clause to corporations would entitle them to claim their exclusive privileges in every other state.

Moreover nothing short of such an extreme doctrine would have helped the defendant in Paul *v.* Virginia. For in Virginia there was at this time no general incorporation law applicable to insurance companies. It was not till 1871 that the circuit courts were authorized to grant charters of incorporation for insurance purposes.[5] This explains why no distinction was suggested to the court, as to the rights of foreign corporations, between states in which freedom of incorporation prevails, and states which confer incorporation as a legislative privilege. To corporations in general, even at that time, the language of the court was inapplicable, for the era of freedom of incorporation had already definitely arrived. A few early general incorporation laws for restricted purposes, religious, charitable, educational, may be put aside. In the period from 1811 to 1850, their scope had gradually and consistently broadened, until by the middle of the century most

[1] See Pollock and Maitland, Bk. II, ch. 3, § 8.

[2] See the Declaration of Rights, in MacDonald, *Select Charters*, 356.

[3] Kyd, 13. Story, J., in Dartmouth College Case, 4 Wheat. 518, 667.

[4] 4 Wheat. 518, 536.

[5] Act of March 30, 1871. (Acts, 1870–71, ch. 277). The previous general incorporation law expressly excepted insurance. Code of 1860, ch. 65, § 4 (p. 779).

of the states permitted incorporation under general laws for almost all business purposes.[1] This revolutionary legislation brought about a change not only in the legal status, but in the very nature of corporations. A business group incorporated under a general law is qualitatively different from a corporation formed to confer a privilege whose value lies in its exclusiveness. Legal terms and conceptions appropriate to one are entirely inapplicable to the other. Incorporation under a general law does not confer a special privilege or franchise. It is a general right open to all. It is true that incorporation may exempt the members from some of the liabilities incident to individual trading; but this does not render it a privilege in any substantial sense. A man and woman, by going through the formalities of marriage, can secure to themselves privileges and immunities with respect to conduct and property, which an individual cannot claim; but this does not mean that marriage is a peculiar privilege accorded by the state.

That this change in the substance of incorporation called for a new set of legal terms and ideas, courts have been but slow to grasp. One far-seeing judge saw it while the change was in its infancy. Chief Justice Spencer, in 1822, referring to the New York general law of 1811, put the matter in language that has not since been improved upon:[2]

> The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes, was, in effect, the formation of partnerships, without the risks ordinarily attending them, and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating and becoming incorporated, for the purposes held out in the act, are offered to all who will conform to its requisitions. There are no franchises and privileges which are not common to the whole community. In this

[1] See Baldwin, "Freedom of Incorporation," in *Modern Political Institutions*, p. 195.

[2] Slee *v.* Bloom, 19 Johns. 456 (1822).

respect incorporations under the statute differ from corporations to whom some exclusive or peculiar privileges are granted.

But this was a voice crying in the wilderness. It is only in comparatively recent times that the profound nature of the change has been appreciated.[1] This tardiness is not peculiar to America. Gierke has observed, on the Continent, the early identification of a corporation with its special privileges and immunities, and the tendency among jurists to carry over into the modern era of freedom of association the legal conceptions of the earlier period.[2] But slow as was its acknowledgment, the fact cannot now be denied. Decisions which were based on the notion that a corporation is a special privilege cannot be considered authorities under general incorporation laws.

Since Paul *v.* Virginia, it has been assumed, without argument, that a corporation cannot claim the protection of Article IV, Section 2, of the Constitution. But the theory that a corporation is to be treated for purposes of jurisdiction as a citizen of the state which chartered it, or as it is sometimes put, the theory of the " indisputable citizenship " of its stockholders, has had a career of its own, which has strikingly illustrated the peril of seeking to build a legal edifice on a fiction. Cases in which a corporation exists by virtue of the concurrent or successive legislation of two or more states, or is organized by virtue of general permissive laws of two or more states, put the theory to the test. Is

[1] See 2 Morawetz, *Corporations*, § 923, 1 Machen, *Modern Law of Corporations*, § 19–22, for criticisms of the old point of view. Cf. Senator Stewart, in the debate on the Sherman Law, March 25, 1890 (*Congressional Record*, 51st Cong., 1st. Sess. 2606): " All the States, instead of having corporations dealt out to private individuals by private statutes, have passed general incorporation laws, and there is as much freedom of competition between corporations now as there is between individuals. The great harmfulness of corporations was that they were monopolies; that others could not form them. It required special acts or special favors to create them; the people could not form them."

[2] *Genossenschaftstheorie*, 90.

there in such a case an indisputable presumption that the stockholders are citizens of both states? The traditional doctrine, dating back to an early opinion by Justice Story,[1] has always been that although such a corporation acts as one, looks like one, has one set of books and one list of stockholders, it is nevertheless a separate corporation in each state. True to this doctrine, which was obviously the only one consistent with the principles laid down in Bank of Augusta *v.* Earle,[2] Chief Justice Taney held, when the question first arose, that such a corporation, formed both in Ohio and Indiana, was a citizen in each state, and that a suit purporting to be in the name of the joint corporation, against a citizen of Indiana, in the federal courts, must be dismissed, seemingly on the ground of misjoinder of parties plaintiff![3] In this case counsel alleged that the corporation had its principal place of business in Ohio, and in consequence was a citizen of that state; but the argument did not prevail. The Chief Justice said:

It is true, that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio,

[1] Farnum *v.* Blackstone Canal Corp., 1 Sumner, 46 (1830). This was a bill by a Massachusetts mill owner against a Canal Company incorporated both in Rhode Island and in Massachusetts. The Company had built in Rhode Island a dam which flooded back on the plaintiff's land in Massachusetts; and the decision turned on whether a justification could be found in either the Massachusetts or the Rhode Island charters. Mr. Justice Story said in part:

"Although in virtue of these several Acts the corporations acquired a unity of interests, it by no means follows that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, as before, according to their respective Acts of incorporation. Neither could exercise the rights, powers or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The Acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations, acting within the sphere of their respective charters for purposes of common interest, and not as a case, where all the powers of both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation."

[2] 13 Pet. 519 (1839). [3] Ohio and Mississippi R. *v.* Wheeler, 1 Black. 286 (1861).

clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity, or person, which exists by force of law, can have no existence beyond the state or sovereignty which brings it into life and endues it with its faculties and powers. The President and Directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States.

In Railway Company *v.* Whitton,[1] the defendant was incorporated under the laws of Illinois, Wisconsin and Michigan. It was sued in the Wisconsin state court, by a citizen of Illinois. The plaintiff then petitioned for removal to the federal court, and the petition was resisted on the ground that the railroad "was a corporation created and existing under the laws of the States of Illinois, Wisconsin, and Michigan; that its line of railway was located and operated in part in each of these states, . . . that its entire line of railway was managed and controlled by the defendant as a single corporation; that all its powers and franchises were exercised and its affairs managed and controlled by one board of directors and officers; that its principal office and place of business was at the City of Chicago, in the State of Illinois, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin." The petition was, nevertheless, sustained. "The answer to this position," said Mr. Justice Field, "is obvious. In Wisconsin the laws of Illinois have no operation. The

[1] 13 Wall. 270 (1871).

defendant is a corporation, and as such a citizen of Wisconsin, by the laws of that state. It is not *there* a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere."

In Muller *v.* Dows,[1] the principle was followed. A corporation was formed as a consolidation of a Missouri and an Iowa corporation, and suit was brought in the federal court in Iowa, by a Missouri citizen. " The two companies," said the court, " became one. But in the State of Iowa, that one was an Iowa corporation, existing under the laws of that state alone. The laws of Missouri had no operation in Iowa." The language has an almost theological flavor. The case was again followed in Memphis Railroad Company *v.* Alabama,[2] holding that a Tennessee corporation, allowed to extend its line into Alabama on condition of reincorporating there, could not remove to the federal courts a suit brought in Alabama by an Alabama citizen. The corporation " must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

These were suits against the corporation. But where the corporation was suing, could it not choose which of its legal personalities it would rely upon, or more accurately, in which state it preferred to have its stockholders indisputably presumed to be citizens ? The Supreme Court so held, in Nashua and Lowell Railroad *v.* Boston and Lowell Railroad.[3] Here a New Hampshire and a Massachusetts corporation had consolidated, under statutes of the two states each of which expressly declared that the two corporations should become one. The controversy arose out of the erection of a Terminal in Boston. Desiring to bring the controversy into the federal courts, the consolidated railroad sued as a New Hampshire

[1] 94 U. S. 444 (1876). [2] 107 U. S. 581 (1882). [3] 136 U. S. 356 (1890).

corporation, in the federal court in Massachusetts, and the suit was sustained, after elaborate argument, and careful consideration.

If such a corporation could, of its own choice, sue as a citizen of either state, could not any corporation which wished to get into the federal courts achieve the same object by securing, in the name of all its stockholders, a charter in an adjoining state, and conveying to it the cause of action to be litigated? The attempt was made, but in Lehigh Mining Company *v.* Kelly [1] it met with a check, though not without the dissent of three of the ablest members of the Supreme Court. Despite the unquestioned doctrine that an assignment could be made to a third party with the sole purpose of conferring jurisdiction on the federal courts, the court held the doctrine of indisputable citizenship did not apply to a corporation so formed. There seems to be a recognition in the opinion of the majority of the absurdities to which that doctrine might lead:

> If the rule which has been invoked be regarded as controlling in the present case, the result, curiously enough, will be that *immediately prior to* February, 1893 — before the Pennsylvania corporation was organized — the stockholders of the Virginia corporation were, presumably, citizens of Virginia; that, a few days thereafter, *in* February, 1893, when they organized the Pennsylvania corporation, the same stockholders became, presumably, citizens of Pennsylvania; and that, on the 1st day of March, 1893, at the time the Virginia corporation conveyed to the Pennsylvania corporation, the same persons were presumably citizens, at the same moment of time, of both Virginia and Pennsylvania. [2]

The following year, this principle of dual citizenship was, as to one large class of cases, virtually abandoned. A Missouri corporation was authorized to extend its line into

[1] 160 U. S. 327 (1895).

[2] The case has since been followed: Miller and Lux *v.* East Side Canal Company, 211 U. S. 293 (1308); Green County *v.* Thomas' Executors, 211 U. S. 598 (1909).

Arkansas, under an Arkansas statute which provided that it should thereupon become a corporation of the state, "anything in its articles of incorporation or charter to the contrary notwithstanding." It was sued in Arkansas, in the federal courts, by a Missouri citizen; and the Supreme Court held, on a full reconsideration of the authorities, that the court did not have jurisdiction.[1] The doctrine that in Arkansas it could be looked upon only as an Arkansas corporation, was expressly overruled:

> The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation.
>
> We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purposes of Federal jurisdiction, to be composed of citizens of such state, is authorized by a law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the state of its original creation.
>
> We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power.

Although put in the form of a renunciation of jurisdiction, and of a disclaimer of intent to extend the doctrine of corporate citizenship, the effect of the case was really, as soon developed, just the opposite. Formerly, a state could counteract the effect of the doctrine, as to suits brought by its own citizens in its own courts, by compelling the foreign corporation to reincorporate. As a domestic corporation, it could not henceforth remove to the federal courts any suits

[1] St. Louis and San Francisco Railway Company *v.* James, 161 U. S. 545 (1896); Louisville, New Albany, etc., Railway *v.* Louisville Trust Company, 174 U. S. 552 (1899); Southern Railway *v.* Allison, 190 U. S. 326 (1903) accord.

brought by a citizen of the state. But now this device failed. The corporation remained a citizen only of the original state of incorporation, and the state courts could not prevent a removal to the federal courts. The doctrine of the case applied, however, only where a corporation of one state had been compelled to reincorporate in another. A corporation formed simultaneously in a number of states cannot invoke the doctrine, for it has no original state of incorporation; and it was accordingly held that such a corporation could not claim the privilege of removal.[1] Mr. Justice Holmes, for the court, said:

> No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation, are needed for an answer. The defendant exists, in Illinois, by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same state, and is sued in that state. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere.

The court makes, however, several interesting suggestions:

> What would be the law in case of a suit brought in Illinois upon a cause of action which arose in Ohio, is a question that may be left on one side, as also may be the decisions in cases where a corporation originally created in one state afterwards becomes compulsorily a corporation of another state for some purposes in order to extend its powers. In the case at bar the incorporation must be taken to have been substantially simultaneous and free. If any distinction were to be made it hardly could be adverse to the jurisdiction of Illinois, in view of the requirements of its constitution and statutes that the directors should be residents of Illinois, and that the corporation should keep a general office in that state.

There are here two suggestions, each pregnant with possibilities: That an interstate corporation is a citizen of each state only with respect to causes of action arising therein; or that it is a citizen of one state only, the state in which its

[1] Patch *v.* Wabash Railroad Company, 207 U. S. 277 (1907). See Missouri Pacific Railway Company *v.* Castle, 224 U. S. 541 (1912).

principal offices are maintained. I shall return to these suggestions later, when a broader foundation shall have been laid for considering them on principle.[1] In the meantime the historical narrative must be resumed where it was left off. A case decided in the Supreme Court not long ago may fittingly close this chapter. A New Jersey citizen, stockholder in a New York corporation, brought a stockholders' bill in the federal court in New York. Since jurisdiction depended on the doctrine of indisputable citizenship, he necessarily alleged that there was a conclusive presumption that all the stockholders were citizens of New York. The defendant replied, with ineluctable logic, that by so alleging, he alleged himself out of court, since there necessarily arose an irrebuttable presumption that the plaintiff himself was a citizen of New York, and hence there could be no diversity of citizenship. Of course the Supreme Court followed sense rather than logic, and sustained the jurisdiction, frankly admitting, however, that the presumption of citizenship was a pure fiction, devised for no other purpose than to enable the court to assume a jurisdiction which it believed the Constitution did not confer.[2]

[1] See *post*, ch. X.

[2] Doctor v. Harrington, 196 U. S. 579 (1905).

CHAPTER V

JURISDICTION OF THE COURTS OVER FOREIGN CORPORATIONS

As foreign corporations became an increasingly important factor in the business communities of the several states, and their legal status to be generally recognized and accepted, the question inevitably arose whether they could be subjected to suit within the state. Until toward the middle of the century, the idea seems to have been widely prevalent that foreign attachment was the only process available against them. An early dictum of the Supreme Court of New York probably had much to do with this belief. A state statute provided for proceedings against absconding and absent debtors, by foreign attachment, and the question was whether this law, which referred throughout only to "debtors" and "persons," was available against a foreign corporation owning property within the state. The court held that it was not.[1] Spencer, J., said:

The court have no doubt, from a view of the whole act, that the legislature intended to authorize proceedings under it against natural persons only. The twenty-first section supposes that the person giving the security to appear and plead to any action to be brought, would, if within the state, be subject to suit; and, we think, a foreign corporation never could be sued here. The process against a corporation must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another state were to come within this state, he would not represent the corporation here, his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived this character; and though

[1] Matter of M'Queen *v.* Middletown Manufacturing Company, 16 Johns. 5 (1819).

possibly, it would be competent for a foreign corporation to constitute an attorney to appear and plead to an action instituted under another jurisdiction, we are clearly of opinion that the legislature contemplated the case of a liability to arrest, but for the circumstance that the debtor was without the jurisdiction of the process of the courts of this state; and that the act, in all its provisions, meant, that attachments should go against natural, not artificial, or mere legal entities.

There was, of course, no doubt that foreign attachment against corporations of other states could be expressly authorized by statute. Rhode Island made such a provision in 1822,[1] New York in 1829,[2] Maryland in 1832,[3] Pennsylvania in 1836,[4] New Jersey and Massachusetts in 1839.[5] By 1850, Missouri, Michigan, Maine and Wisconsin had followed suit.[6] In the meantime the Supreme Court of Pennsylvania in an exhaustive opinion had declined to follow the lead of New York, and had construed its general foreign attachment statutes as applicable to foreign corporations.[7] Until the middle of the century, this seems to have been the normal way of proceeding against corporations of other states.

But the dictum of Judge Spencer, that a foreign corporation could not be sued *in personam*, was grounded on a principle that might raise constitutional difficulties. Since New York had no statute authorizing such a suit, the dictum clearly meant no more than that the common law provided no available method of service. In Peckham *v.* North Parish in Haverhill,[8] the Massachusetts Supreme Court reached the

[1] Rev. Laws, 1822, 162.

[2] Rev. Stats. 1829, tit. IV, art. 1, § 15–30.

[3] Laws of 1832, ch. 280.

[4] Laws, 1835–36, 586.

[5] New Jersey Acts of 1838–39, 63; Massachusetts Acts of 1839, ch. 158.

[6] Missouri Rev. Stats. 1845, art 1, § 22, 124; Michigan Rev. Stats. 1846, ch. 116, § 9 ff.; Maine, Rev. Stats. 1847, ch. 76, § 5; Wisconsin Rev. Stats. 1849, ch. 113, § 8 ff.

[7] Bushel *v.* Commonwealth Insurance Company, 15 S. & R. 173 (1827).

[8] 16 Pick. 274 (1834).

same conclusion. Two adjoining incorporated parishes, one in New Hampshire and the other in Massachusetts, had joined in engaging a minister of the gospel, and he sued the Massachusetts corporation for his salary. A plea of non-joinder of the New Hampshire parish was held bad, on the ground that there was no way of bringing suit against a New Hampshire corporation. Chief Justice Taney's enunciation of the theory of the nonexistence of a corporation outside its native sovereignty gave added force to this view. For his theory that a corporation could act outside the state by agents, while effectual to justify its suing and contracting in another state, would not render it liable to service of process without violating what Mr. Justice Johnson had termed an "eternal principle of justice," namely "that jurisdiction cannot be justly exercised by a state . . . over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits." [1]

The following year the Chief Justice of the Superior Court of New York dismissed a proceeding by summons against a foreign corporation which had established an office and was doing business in the state.[2] The court said:

> But foreign corporations have their legal existence, and are located within the territory, the state or government that creates them; and can in no legal sense be said to be within this state. No suit can be brought, in this court, directly [i. e., *in personam*] against a corporation, which is out of the state, any more than against an individual debtor, who is absent therefrom.

In Middlebrooks *v.* The Springfield Fire Insurance Company,[3] Connecticut held that her statutes providing for service against corporations was inapplicable to foreign corporations, the court quoting with approval the dictum of

[1] Mills *v.* Duryee, 7 Cranch, 481 (1813).

[2] Kane *v.* Morris Canal and Banking Company. The opinion is set forth in a footnote in 14 Conn. 303.

[3] 14 Conn. 301 (1841).

Spencer, J., and the opinion of Taney. The court went further:

> It might admit of a serious question whether it would be competent for the authority of the state to prescribe, in an action *in personam*, like the present, any process, by which a defendant, not personally within the territorial jurisdiction of the state, could be reached or bound.

On the other hand the Supreme Court of Pennsylvania, in the Bushel case,[1] had suggested that Judge Spencer's dictum was inapplicable where the corporation had actually located an office in the state to do business. And this suggestion had been taken up and approved by Angell and Ames in 1832.[2]

The first statute expressly providing for suits *in personam* against foreign corporations was in Florida, in 1829, where it was enacted " That in original process issued against any corporation, service upon the agent of said corporation shall be valid . . . *Provided* the corporation is not a body politic within this territory." [3] There seems to have been no early case applying this statute. But in 1834, Maryland made a more elaborate attempt to avoid constitutional difficulties. In " An Act to regulate the proceedings of Foreign Corporations within the state," [4] it was enacted that any foreign corporation which " shall transact or shall have transacted business within this state, shall be deemed to hold and exercise franchises within the state." Any corporation thus exercising franchises was made liable to suit " on any dealing or transaction in this state." This act was upheld by Justice Thompson, of the Supreme Court of the United States, sitting at circuit, in an opinion which, while little known, because not at the time officially reported, is of great interest, as it contains the earliest enunciation of the doctrine of

[1] 15 S. & R. 173, 175 (1827).
[2] Angell and Ames on *Corporations*, 209.
[3] Act of November 21, 1829, § 8.
[4] Laws of 1834, ch. 89.

implied consent to extraterritorial service later adopted by the Supreme Court.[1]

The suit in the circuit court was founded on a judgment obtained against a Connecticut life insurance company, in a county court in Maryland. The company had a resident agent in Maryland, and process had been served on him, under the statute above referred to. The court held, what was not then settled, that the jurisdiction of the Maryland court was open to inquiry under the full faith and credit clause; and decided that the judgment was invalid, the act having been passed after the loss occurred. But Mr. Justice Thompson said:

> And the abstract justice of the law as applicable to subsequent cases cannot be questioned. The defendants as a body corporate could have no right to establish themselves or transact business in the state of Maryland, otherwise than according to the provisions of the laws of that state. The provision in the Constitution of the United States, "That the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," cannot be applied to corporations, and the state of Maryland has a right to exclude the corporation from transacting business in that state. And if the defendants, after the passage of that law, had continued underwriting policies in that state, they would be presumed to do it upon the terms and conditions of the act; and as to all causes of action thereafter arising would subject themselves to prosecution in the mode pointed out by the act.
>
> This law may be considered as a kind of quasi-incorporation of insurance companies which have not been chartered by the state, and if such companies exercise franchises there, it is just and reasonable that they should subject themselves to prosecutions for losses in the courts of that state, and will be deemed to have assented to the mode prescribed by the act for instituting suits for such losses.

[1] Warren Manufacturing Company *v.* Etna Insurance Company, Circuit Court of United States, Connecticut, 1837. The opinion was rendered, it will be observed, two years before the decision in Bank of Augusta *v.* Earle. It was first published in 1843, in the American Jurist, under the title "Law of Foreign Corporations," accompanied by a vigorous editorial criticism of the doctrine of the case by Mr. Samuel F. Dixon. Later reported in 2 Paine, 501, in 1856.

The following year, in Libbey *v.* Hodgdon,[1] the Supreme Court of New Hampshire took the bold step of allowing a suit against the Portland Stage Company, a Maine corporation, by service on the clerk in charge of its New Hampshire business, under a statute which did not expressly include foreign corporations. The reasoning was that

> . . . if, upon principles of law or comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognize their existence for the one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities; and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here.

The court expressed the opinion, however, that even though the language of the statute might authorize it, service on an agent only casually within the state would be invalid.

In Day *v.* Essex County Bank,[2] the Supreme Court of Vermont reached the same result, Redfield, J., observing that " we can see no very good reason why artificial persons should not be liable to suit in the courts of another state, as well as natural persons." In this case, however, the corporation probably had consented to the jurisdiction by pleading to the merits.

The distinction suggested in the Bushel case, and in Libbey *v.* Hodgdon, between a foreign corporation which transacts business in the state, and one whose officer is only casually in the state, was acted on by the New Jersey Supreme Court in a case before that court in 1853, and again in 1855. The suit was on a New York judgment, obtained under Section 134 of the Code of Procedure, authorizing suit against a foreign corporation, by service on its managing agent, " when it has property within this state, or the cause of

[1] 9 N. H. 394 (1838). [2] 13 Vt. 97 (1841).

action arises therein." A plea in abatement that the defendants were a foreign corporation and had no office or place of business in New York, was sustained, the court remarking that a law permitting service under such circumstances " is unreasonable, and so contrary to natural justice and to the principles of international law that the courts of other states ought not to sanction it." [1] The same case came before the court again two years later, it having developed that the defendant had established an office in New York, had there written the insurance in question, and had then withdrawn its office. Service was on its president, subsequent to the withdrawal, while casually in the state. This the New Jersey Court held sufficient. The decision was placed squarely on the ground that a foreign corporation which establishes an office in the state is actually present within the jurisdiction. While professing its adherence to what it termed " the familiar principle of the common law, that a corporation has a legal existence only within the limits of the state by which it is created," the court maintained that:

> The rule rests upon a highly artificial reason, and however technically just, is confined at this day in its application within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal; nay it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has, then, existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in a case of a private individual, and that the corporation itself is not present, the answer is, that a corporation acts nowhere, except by its officers and agents. It has no tangible existence, except through its officers. For all practical purposes, its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it.

[1] Moulin *v.* Trenton Mutual Life and Fire Insurance Company, 24 N. J. L. (4 Zabr.), 222 (1853). Same case (further proceedings), 25 N. J. L. (1 Dutch.), 57 (1855).

The court then concluded that once the corporation had submitted to the laws of New York, and incurred liability there, it could not avoid service by withdrawing its office from the state.

Here were two theories as to the suability of a foreign corporation: Justice Thompson's theory of implied consent to the terms of the statute, and Chief Justice Green's theory of the actual presence of the foreign corporation. Justice Thompson's theory prevailed in the Supreme Court of the United States, in a decision rendered the same year as the second Moulin case, in the case of Lafayette Insurance Company *v.* French.[1] The case came up from the Federal Circuit Court in Indiana, and was a suit on an Ohio judgment against an Indiana insurance company, obtained under an Ohio statute authorizing suits *in personam* against foreign insurance companies by service on a local agent. Justice Curtis, speaking for all but one dissenting member of the court, said:

> A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense. . . . Now when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts.

Thus was the theory that a corporation cannot transcend state boundaries reconciled with the practical necessity of de-

[1] 18 How. 404 (1855).

vising a method of suing a foreign corporation. The rule of the case was rounded out in a clear-cut opinion by Mr. Justice Field, in St. Clair *v.* Cox,[1] in which the circumstances under which the judgment of a state court against a foreign corporation must be given faith and credit were elaborately discussed. The Michigan statute under which process had been served allowed a judgment *in personam* against a foreign corporation owning property in the state if any agent of the corporation had been served. The Supreme Court held that to save the constitutionality of the statute, it must be held to apply only where the corporation was doing business within the state; and that the presence of an officer casually within the state did not give the court jurisdiction to render a judgment which other states must respect. The decision follows the Moulin case[2] and two other state decisions.[3]

While this decision established that a judgment against a foreign corporation not doing business in the state need not be respected by other states, the opinion persisted for some time, notably in New York and North Carolina, that within the state itself, a judgment *in personam* could be constitutionally founded on service on an agent only casually in the state. In New York a contrary view had prevailed in the State Supreme Court,[4] but the Court of Appeals held such service sufficient.[5] In North Carolina the statute expressly allowed suits against foreign corporations "when such service can be made within the state personally upon the president, treasurer, or secretary thereof."[6] The practical effect of this doctrine was almost nullified by the decision of the

[1] 106 U. S. 350 (1882). [2] 24 N. J. L. 222 (1853).

[3] Newell *v.* Great Western Railway Company, 19 Mich. 336 (1869); Latimer *v.* Union Pacific Railway, 43 Mo. 105 (1868).

[4] Hulbert *v.* Hope Mutual Insurance Company, 4 How. Pr. 275 (1850); Brewster *v.* Michigan Central Rail Road Company, 5 How. Pr. 183 (1850).

[5] Hiller *v.* Burlington and Missouri River Railroad Company, 70 N. Y. 223 (1877); Pope *v.* Terre Haute Car Manufacturing Company, 87 N. Y. 137 (1881).

[6] Revisal, 1909, 440 (1); Whitehurst *v.* Kerr, 153 N. C. 76 (1910).

Supreme Court in Goldey *v.* Morning News[1] that where a foreign corporation petitioned for removal to the federal courts, as a citizen of another state, the federal court would inquire into the question of jurisdiction *de novo*, that it would not follow the state rule allowing service where the corporation was not doing business, and that the objection to the jurisdiction was not waived by filing the petition for removal.[2] The decision meant that a foreign corporation not doing business within the state could always, if it desired, avoid suit by removing to the federal courts, and there moving to have the suit dismissed; and this seems to have been the usual practice. In Mutual Life Insurance Company *v.* Spratley,[3] another method of attack was by implication sanctioned by the court. A judgment had been obtained in the Tennessee courts against a Connecticut insurance company. It filed a bill in the state chancery court asking to have the proceedings under the judgment enjoined, on the ground that no valid process had been served. The injunction asked for was granted, but the state supreme court dissolved it on appeal. On writ of error to the United States Supreme Court, the decision was affirmed, the court holding that, on the facts of the case, the corporation was actually doing business in the state. Throughout the opinion it is clearly assumed, however, that if these facts had not existed, the judgment would have been void for want of due process. Despite this strong intimation, New York and North Carolina persisted in treating such judgments as valid within the state.[4] It was not until 1914 that one of these judgments was

[1] 156 U. S. 518 (1894).

[2] On this last point the case overrules a dictum of Chief Justice Chase, in Bushnell *v.* Kennedy, 9 Wall. 387, 393; a decision of the New York Court of Appeals, Farmer *v.* National Life Association, 138 N. Y. 265; and various decisions at circuit: Sayles *v.* Northwestern Insurance Company, 2 Curtis, 212; Edwards *v.* Connecticut Insurance Company, 20 Fed. 452; Tallman *v.* Baltimore and Ohio Railroad Company, 45 Fed. 156.

[3] 172 U. S. 602 (1899).

[4] Whitehurst *v.* Kerr, 153 N. C. 76 (1910).

directly attacked in the Supreme Court of the United States by writ of error to the court which rendered it, under the due process clause of the Fourteenth Amendment.[1] The judgment was unanimously held unconstitutional, on the ground stated in Pennoyer *v.* Neff,[2] that " proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law."

This line of decisions leaves intact the traditional doctrine founding jurisdiction on an implied consent to service on an absent defendant. In other directions it did not fare so well. Notably was this the case in a series of cases involving the jurisdiction of the federal courts in suits against foreign corporations. The federal judiciary act, in its original form,[3] provided that no suit could be brought in the circuit courts " against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found." To some of the lower federal courts, notably in two cases decided by Mr. Justice Nelson, at circuit,[4] it had seemed a necessary inference from the principles laid down in Bank of Augusta *v.* Earle, that a foreign corporation, being nonexistent there, could not be " found " outside its home state, and hence could not be sued at all in the federal courts. But in Railroad Company *v.* Harris,[5] and Ex Parte Schollenberger,[6] these cases were overruled. The argument of the Supreme Court is interesting. It did not deny that a foreign corporation could have a legal existence only in the state of its incorporation. And the court conceded that " states cannot by their legislation confer jurisdiction upon the courts of the United States,

[1] Riverside Mills *v.* Menefee, 237 U. S. 189 (1915).

[2] 95 U. S. 714 (1877). [3] 1 Stat. 79, § 11.

[4] Day *v.* Newark India Rubber Manufacturing Company, 1 Blatchf. 628 (1850); Pomeroy *v.* New York and New Haven Railroad Company, 4 Blatchf. 120 (1857).

[5] 12 Wall. 65 (1870). [6] 96 U. S. 369 (1877).

neither can consent of the parties give jurisdiction when the facts do not." [1] But it maintained that " both state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. . . . Thus if the parties to a suit, both plaintiff and defendant, are in fact citizens of the same state, an agreement upon the record that they are citizens of different states will not give jurisdiction. But if the two agree that one shall move into and become a citizen of another state, in order that jurisdiction may be given, and he actually does so in good faith, the court cannot refuse to entertain the suit. So, as in this case, if the legislature of a state requires a foreign corporation to consent to be ' found ' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the state, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. The essential fact is the finding, beyond which the court will not ordinarily look."

These decisions left the jurisdiction of the federal courts over corporations on a most precarious foundation, grounded on the one hand on an irrebuttable presumption, known to be contrary to the fact, that all the stockholders are citizens of the incorporating state; on the other side on a consent implied by law that the corporation should be " found " where from the nature of its being it could not exist.

In New England Mutual Life Insurance Company *v.* Woodworth,[2] the court held that a life insurance policy was assets, for purposes of administration, in a state in which a foreign corporation was doing business, on the ground that it could be sued there, the court observing that the company " must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil."

[1] 96 U. S. 369, 377. [2] 111 U. S. 138 (1884).

The language, however, was not to be taken literally, as was soon to appear. The Judiciary Act was amended,[1] by omitting the phrase " or in which he shall be found," and adding a sentence limiting jurisdiction, in cases depending on diversity of citizenship, to suits brought " in the district of residence of either the plaintiff or the defendant." In other cases, suit could be brought only where the defendant was an inhabitant. In Shaw *v.* Quincy Mining Company,[2] the court held that a corporation was an " inhabitant," within the meaning of this law, only in the state of incorporation. And in Southern Pacific Company *v.* Denton,[3] the same meaning was ascribed to the term " residence," so that a citizen resident in the eastern district of Texas could not sue in the western district a Kentucky corporation which was there engaged in business. These decisions closed the federal courts to suits against corporations of other states with the exception of suits brought by a citizen in the state in which he was a resident, against a foreign corporation doing business there. In In re Hohorst,[4] the section of the act was held inapplicable to a suit against a corporation of a foreign country, which could not from its nature be a resident in any state. To these two instances, the doctrine of Ex Parte Schollenberger still applied, that state legislation, and the consent of the corporation, could " bring about a state of facts " which would vest the courts with jurisdiction.

The ground was completely cut from under this theory of jurisdiction in the remarkable case of Barrow Steamship Company *v.* Kane.[5] The suit here was against an English corporation, with offices in New York. The plaintiff was a citizen of New Jersey, and the cause of action arose in the British port of Londonderry. Under these circumstances the New York Code did not permit suit against foreign cor-

[1] Acts of March 3, 1887, ch. 373, § 1; Acts of August 13, 1888, ch. 866.
[2] 145 U. S. 444 (1891).
[3] 146 U. S. 202 (1892).
[4] 150 U. S. 653 (1893).
[5] 170 U. S. 100 (1898).

porations.[1] Nevertheless a unanimous court upheld the jurisdiction of a federal court, sitting in New York.

For the decision itself, many respectable precedents could be found. In England, in the case of Newby *v.* Von Oppen,[2] Lord Blackburn had sustained a suit against a foreign company which had an office in England, although no statute in terms authorized it. The general laws as to service of process on corporations were deemed sufficient. We have seen that long before, New Hampshire and Vermont had reached the same result,[3] and other states had followed.[4] More immediately in point, Judge Lowell had sustained the jurisdiction of the federal court, in Massachusetts, although under state decisions foreign corporations were liable only to foreign attachment.[5] But these cases were not predicated on the theory of the nonexistence of a corporation beyond state limits, to which the Supreme Court was committed. Now the Supreme Court had reaffirmed its traditional doctrine with emphasis only six years before,[6] and it did not even now repudiate it. Yet on any other theory than that of the actual presence of the corporation, the decision is incomprehensible. To produce the " state of facts " necessary to give the court jurisdiction over an absent corporation, two things were in Ex Parte Schollenberger considered necessary: a state statute, and the consent of the corporation. Here the state statute did not authorize the suit; and to imagine that a foreign corporation which does business in a state whose laws forbid such suits, thereby manifests an actual consent to service in the federal courts, is to exhibit no very keen understanding of business psychology. The consent is obviously a mere fiction.

[1] Code, § 1780. [2] L. R. 7 Q. B. 293 (1872). [3] *Supra*, 82.

[4] City Fire Insurance Company *v.* Carrugi, 41 Ga. 660 (1871). See Perpetual Insurance Company *v.* Cohen, 9 Mo. 416 (1845).

[5] Hayden *v.* Androscoggin Mills, 1 Fed. 93 (1879).

[6] Shaw *v.* Quincy Mining Company, 145 U. S. 444 (1891).

In other respects, also, the Supreme Court has refused to abide by the consequences of this theory of implied consent. If a human individual consents to be bound by service on an agent, his consent, at least while it continues, validates any judgment so obtained.[1] It would obviously be absurd to consider a judgment a taking of property without due process, if the defendant consented. Now the ablest champions of the consent theory have justified it on the ground that doing business in the state was an expression of a real consent to service in the mode prescribed in the statute. The point has been most clearly made by Professor Beale:[2]

> Since consent is given by acts, not by mere thoughts or words, this implied consent is as real as consent expressed by spoken or written words. Not the words themselves but the act of speaking or writing them, is the legal consent; and the act of doing business in acceptance of a conditional offer is equally an act of consent to the terms of the offer thus accepted.

According to this theory, the consent thus expressed is necessarily a continuous one, momentarily renewed as long as business within the state is continued; and it embraces any mode of service, so long as it is embodied in the laws of the state. If the method of service is arbitrary, and contrary to accepted notions of due process, the corporation cannot complain, for at the very moment of service, it is manifesting its consent thereto. It is, so to speak, in the position of a bare licensee, and must take the legal premises as it finds them or keep out. But this is not the doctrine of the Supreme Court. It was definitely established in Mutual Life Insurance Company *v.* Spratley,[3] that in addition to the constitutional requisite that the corporation be doing business in the state, it was essential that service be upon an agent sufficiently representative in character that "the law would

[1] Montgomery, Jones and Company *v.* Liebenthal [1898], 1 Q. B. 487 (C. A.).
[2] Foreign Corporations, § 266.
[3] 172 U. S. 602 (1898).

imply, from his appointment and authority, the power to receive service of process." The court strongly implied that service on " any agent " of the corporation, as authorized in the statute, would not be sufficient. In a more recent case the rule is stated more carefully:

> The law of the state may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process.[1]

This rule seems clearly applicable to statutes appointing a state official, in no way connected with the foreign corporation, statutory agent to receive process on its behalf. If the statute makes proper provision for notifying the corporation, it is undoubtedly constitutional.[2] But in several states the statutory agent is under no duty to give such notice. An emphatic dictum of the Louisiana Supreme Court,[3] and three decisions in the federal district courts,[4] have held such a statute contrary to due process. There is also a California decision that service under a similar statute operates only *in rem*, to bind property within the jurisdiction, and is subject to the strict rules governing constructive service.[5] It seems likely that this rule will prevail in the Supreme Court.[6]

The Supreme Court has recently countenanced a further limitation on the theory of implied consent, which illustrates strikingly the fictitious character of the consent on which the

[1] Commercial Mutual Accident Company *v.* Davis, 213 U. S. 245 (1909).

[2] See Mutual Reserve Association *v.* Phelps, 190 U. S. 147 (1902).

[3] Gouner *v.* Missouri Valley Company, 123 La. 964, 49 So. 657 (1909).

[4] Southern Railway Company *v.* Simon, 184 Fed. 959 (1910); affirmed on another ground in Supreme Court, 236 U. S. 115 (1915). See *post*, 93. King Tonopah Mining Company *v.* Lynch, 232 Fed. 485 (1916). Knapp *v.* Bullock Tractor Company, 242 Fed. 541 (1917).

[5] Holiness Church *v.* Metropolitan Church Association, 107 Pac. 633 (Cal. App. 1910). See also, accord with respect to domestic corporations, Pinney *v.* Providence Loan Company, 106 Wis. 396, 82 N. W. 308. Cf. State *v.* Petroleum Company, 58 W. Va. 108, 51 S. E. 465 (1905).

[6] The point was left open in Simon *v.* Southern Railway Company, 236 U. S. 115 (1915).

court's jurisdiction is thought to rest. If an individual voluntarily appointed an agent with general power to accept service clearly this would authorize service on any cause of action. The same should be true of a corporation, provided, again, the consent were real. If, now, doing business in the state is a real consent to the conditions prescribed in the state statute, " implied " and " actual " consent would be coextensive. Yet it has been for some time the doctrine of the Supreme Court that " implied " or " statutory " consent to service on a public official designated in the state law does not extend to causes of action arising out of business done outside the state. Old Wayne Mutual Life Insurance Company *v.* McDonough,[1] established that a judgment obtained by this mode of service, on a life insurance policy contracted for in another state, was not entitled to full faith and credit; and in Simon *v.* Southern Railroad Company,[2] such a judgment was held contrary to the due process clause, and its enforcement within the state which rendered it was enjoined. The reasoning of the court is most clearly set forth in the latter case:

> Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agents, service, in proper cases, may be made upon an officer designated by law. Mutual Reserve Association *v.* Phelps, 190 U. S. 147; Mutual Life Insurance Company *v.* Spratley, 172 U. S. 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts wherever made, and suits for torts wherever committed, might by virtue of such compulsory statute be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship aris-

[1] 204 U. S. 8 (1906). [2] 236 U. S. 115 (1915).

ing from such extraterritorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Life Association *v.* McDonough, 204 U. S. 22, that the statutory consent of a foreign corporation does not extend to causes of action arising in other states.

In two recent cases in New York, one in the federal district court,[1] the other in the State Court of Appeals,[2] the argument was made that as a consequence of the Simon case, service on a foreign corporation on a cause of action arising in another state should be held ineffectual even where an agent had in fact been authorized to accept service. The syllogism seemed complete. The corporation is absent. Therefore it can be sued only with its consent. If it does business in the state, it thereby manifests its consent to all valid provisions of the state law. This manifestation of consent does not justify service on a cause of action arising in another state. Therefore the provision in the state law authorizing such service is invalid. In each case, however, the argument was rejected. The conclusion was avoided only by a frank recognition of the fictitious character of implied consent. Judge Learned Hand, in the federal district court, put the matter clearly:

> These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious, and the vice arises, I think, from confounding a legal fiction with a statement of fact. When it is said that a corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its control, since it need not do business within the state, but that is not equivalent to a consent;

[1] Smolik *v.* Philadelphia and Reading Coal Company, 222 Fed. 148 (1915).

[2] Bagdon *v.* Philadelphia and Reading Coal Company, 217 N. Y. 432 (1916).

actually it might have refused to consent, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent. The limits of that intent are as independent of any actual intent as the consent itself.

But the actual appointment of an agent manifests consent quite independently of any law. In the words of Judge Cardozo, speaking for the Court of Appeals, "The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent."

Of the two theories of consent which I have quoted, the one by Judge Hand, the other by Professor Beale,[1] the latter clearly is no longer sustained by the authorities. Nor is it in principle entirely satisfactory. When we say that an absent defendant cannot be sued *in personam* without his consent, we may mean either of two things: that he must have had in a psychological sense a willingness to be served; or that he must have so expressed himself that a reasonable person would understand him to be willing. One is the internal, the other the external standard of consent. Professor Beale adopts the external standard, the acts of doing business being the overt acts calculated to convey the impression of consent. But could this reasoning apply where overt acts are flatly contradicted by words? If a corporation does business, all the while protesting that it does not authorize any one to accept process on its behalf, there is no consent even in the external sense. The *ensemble* of acts and words convey a clear impression of nonconsent. To say that the corporation is estopped to set up its illegal failure to consent does not help us. It is merely another way of saying, with Judge Hand, that the law will presume consent. Professor Beale's theory merely conceals the fiction in more plausible language.

[1] *Supra*, 91, 94.

Yet from a constitutional point of view Judge Hand's theory is even less satisfactory. In the development of the common law, a legal fiction may have some legitimate place. It has some justification, perhaps, as a method of experimentation; the fiction permits the court to encroach slightly on an accepted legal formula, leaving it to later decisions whether the formula itself is to be overthrown. It may also play a useful rôle as a simplifier of the technique of the law. But in the treatment of constitutional questions it is entirely unjustifiable. It means that a court can avoid an acknowledged constitutional restraint by assuming a fact which it knows to be untrue. But "the Constitution is not to be satisfied with a fiction." [1] It seems very clear that if the corporation is in fact absent from the state, and if the doctrine of Pennoyer *v.* Neff, that an absentee cannot be served without his consent, is to stand, consent must be real, in either the internal or the external sense, and cannot be presumed, "for purposes of justice," by the court.

In another respect, also, a controversy has arisen over the correct interpretation of the rule in the Simon case. By the traditional theory prevailing since Lafayette Insurance Company *v.* French,[2] it is unnecessary for a state to require the appointment of an agent to receive process. Service on any representative agent of the corporation, within the jurisdiction, is enough, if the corporation is doing business there.[3] Here also jurisdiction is traditionally justified by the doctrine of implied consent. Does it then follow that even though a foreign corporation establishes an office in the state, and service is made on one of its directors or officers or managing agents, that the court acquires no jurisdiction over causes of action arising in another state? In both the McDonough and the Simon cases, the statute provided for service on a

[1] Holmes, J., in Hyde *v.* United States, 225 U. S. 347, 390 (1917).

[2] 18 How. 404 (1855).

[3] Mutual Life Insurance Company *v.* Spratley, 172 U. S. 602 (1898).

state official in no way connected with the company.[1] The language, it must be admitted, is equally capable of either construction. In Fry *v.* Denver and Rio Grande Railroad Company,[2] a federal district court has held that the doctrine covers a case where process was served on an official of the company, observing that:

> While, as indicated, service of process in that case was had upon a designated official of the state, and not an agent of the corporation, the language employed by the court is, as suggested by counsel for the defendant, obviously as applicable to the latter case as to the former, since manifestly under the principles announced by the court, the basis of all process on a foreign corporation is its actual or implied consent, by entering the state and doing business there, to its being served in accordance with the statute of the state, whether such service be had on an officer of the state or on an agent of the corporation. In either case, such assent without the voluntary appearance of the defendant may only be implied as to process in actions founded on contracts originating within the state.

The same result was reached in Takacs *v.* Philadelphia and Reading Railway Company.[3]

On the other hand, in a well-reasoned opinion, the Texas Court of Civil Appeals has reached a contrary conclusion.[4] The court interprets the Simon case to hold that " the power of the state to designate one who was in no way connected with the foreign corporation as one upon whom service of process might be had, if it exists at all, is limited to causes of action arising out of business and transactions transpiring within the state. . . ."

This conflict will, it may be assumed, soon come before the Supreme Court. It will be a crucial test for the consent theory; and, it may be added, for the geographical theory of

[1] In each case, moreover, the statute put no duty on the state official to notify the corporation that it was being sued. But the court did not rely on this feature.

[2] 226 Fed. 893 (1915).

[3] 228 Fed. 728 (1915).

[4] El Paso and Southwestern Company *v.* Chisholm, 180 S. W. 156 (1915).

Chief Justice Taney. If the court continues to consider the corporation as necessarily absent from the state, and if it adheres to the doctrine that jurisdiction must always be exercised with the corporation's consent, then the case in the federal court must undoubtedly be sustained. There is no difference in principle between presumed consent to service on a government official and presumed consent to service on an agent of the company not otherwise authorized to accept process. Yet such a holding would upset a well-nigh unanimous practice in the state and federal courts.[1] Writing in 1907, Professor Beale was able to cite only two jurisdictions in which foreign corporations could be sued only on causes of action arising in the state: Alabama and Georgia.[2] That same year Georgia, after an admirable historical review of the development of the law of foreign corporations, unanimously reversed itself, and allowed suit on a foreign cause of action.[3] In England also suit on a foreign cause of action against a foreign corporation is regularly allowed.[4] If, on the other hand, the court recognizes that a foreign corporation which does business in the state is actually present there, that it can be sued there, by virtue of its presence, by service on a representative member of the corporation, in the same manner as a human individual, this necessity will be avoided.

Yet another interpretation has been placed on the Simon case, in an opinion which covers some hundred pages of the Missouri reports.[5] The state statute in this case required

[1] Barrow Steamship Company *v.* Kane, 170 U. S. 100, involved a cause of action arising in a British port. And see next note. There is much point to the argument of the Texas court, that "If it was the intention of the court in the Simon case so radically to change universally accepted principles and its own unbroken line of authority, it would doubtless have done so in no uncertain terms, and not by implication merely."

[2] Foreign Corporations, § 280. See also Murfree, Foreign Corporations, § 190.

[3] Reeves *v.* Southern Railway Company, 121 Ga. 561, 49 S. E. 674 (1905).

[4] Logan *v.* Bank of Scotland [1904], 2 K. B. 495 (C. A.).

[5] The Gold Issue Mining Company *v.* Pennsylvania Fire Insurance Company, 267 Mo. 524; 184 S. W. 999 (1916).

foreign corporations to appoint the Superintendent of Insurance agent to receive process; and in another section provided that in the absence of such appointment, the corporation should be deemed to have assented to such service. The corporation had in fact made the appointment. The facts therefore were no different from those in the New York cases above quoted; and the decision might have been placed on the same ground.[1] The court interpreted the Simon case, however, to apply only to what it termed the "poaching contracts" of foreign corporations — to contracts made in violation of the state laws, or torts committed while carrying on business within the state without authority of the law. It applies, the court considered, only where the statute forbids the transaction of business within the state unless an express appointment has been made. This, it must be admitted, is a most curious doctrine. Can it be contended that a corporation occupies a more favorable constitutional position because it has violated a state law? If the Louisiana statute were amended by eliminating the section requiring express appointment, thus founding jurisdiction in every case on implied consent to service on the state official, could it be supposed that the result would be any different? It might be added that in the Simon case the corporation was engaged in interstate commerce, and hence could not be accused of poaching.

To limit the rule of the Simon case to cases of service on a public officer, as was done by the Texas court, seems on the other hand to be entirely reasonable. The method of service on a statutory officer is open to serious abuse, and it may well be justified only as a necessary protection to residents of the state. The distinction acted upon in the New York cases where there had been an express appointment, suggests on

[1] The case has since been affirmed by the Supreme Court, upon this ground, 243 U. S. 93 (1917).

the other hand, a host of perplexing questions yet to be litigated. If the state cannot, constitutionally, treat as done what should have been done, can it bring mandamus to compel it to be done? Or can it indict the corporation, or its officers, for failing to obey the statute requiring the express appointment? Or can it exercise its absolute power of excluding the corporation from doing business in the state, until it shall have complied with the law, and given its "voluntary" consent? A later chapter will indicate a possible solution of these difficulties.[1]

The developments traced in this chapter point, it seems to me, to a total abandonment of the traditional theory, so often reaffirmed since the decision in Bank of Augusta *v.* Earle, that a corporation has no existence outside the state of it creation. We have seen that the English courts, and several state courts, have expressly adopted the opposite theory, that the corporation is in fact present, and for that reason alone liable to suit regardless of any consent. And the Supreme Court itself, in recent times, while not expressly repudiating Chief Justice Taney's famous dictum, has tended more and more to use language implying the corporation's presence. I shall try later to show that the traditional theory is founded on a fundamental theoretical misconception, that it has in fact no substantial meaning. But first it is necessary to trace the subsequent development of another great dictum of Chief Justice Taney, that a state has an unrestrained constitutional power to refuse recognition to a foreign corporation and to exclude it from doing business within its boundaries.

[1] Ch. vii: "The Doctrine of Unconstitutional Conditions."

CHAPTER VI

THE POWER TO EXCLUDE FOREIGN CORPORATIONS

THE third of the important dicta of Taney in Bank of Augusta *v.* Earle received its first direct confirmation in the famous case of Paul *v.* Virginia,[1] involving the validity of a Virginia law imposing special regulations on foreign insurance companies doing business within the state. Statutes of this type had long been familiar. The earliest seems to have been adopted in New York, in 1824,[2] requiring all foreign insurance companies to make reports. The following year Massachusetts prescribed elaborate regulations for foreign insurance companies,[3] requiring the agents of such a company to file a copy of its charter, of the power of attorney under which they acted, and a sworn statement of a majority of the directors as to the capital stock, debts, investments, etc., of the corporation, and forbidding its doing business at all unless it had more than $200,000 paid-in stock, and was restricted by its charter or otherwise to individual risks of not more than 10 per cent of the capital. The policy of many of these restrictions seems to have been to put foreign insurance companies on a parity with domestic corporations. Many of the states had elaborate provisions designed to insure the solvency and conservative management of their own insurance companies, and they could not be expected to permit these laws to be evaded by the device of foreign incorporation.[4] But this was not the policy of the Penn-

[1] 8 Wall. 168 (1868). One aspect of this case was considered, *supra*, 64.

[2] Ch. 277, Acts of 1824, 340. [3] Act of 1827, ch. 141.

[4] See, for instance, the preamble to the New Jersey statute, Laws 1826, 67:

"Whereas it is represented to the legislature that associations or companies of individuals, not resident in this state, nor incorporated by its laws, do nevertheless

sylvania act of 1810,[1] making it criminal for companies or individuals of any foreign country to write insurance in the state; or of the act of April 23, 1829, in the same state,[2] imposing a tax of 20 per cent on all premiums collected by agents of insurance companies incorporated in another state; or of a 10 per cent tax of the same character in the New York laws.[3] Here were discriminations against foreign corporations obviously designed to protect local insurance interests against interstate or foreign competition. It was an attempt, fortunately abortive, to make the business of insurance a protected franchise, of the same character as banking.

A series of carefully reasoned state decisions had upheld these statutes. The first reported case was that of Commonwealth *v.* Milton,[4] sustaining a $100 license tax required of foreign insurance companies, but not of domestic ones. The court's reasoning was that corporate charters were "peculiar privileges, creations of the local law," and not privileges of citizens as such; and that the federal constitution preserved to citizens "not the laws or the peculiar privileges which they may be entitled to in their own state, but such protection and benefit of the laws of any and every other state, as are common to the citizens thereof, in virtue of their being citizens." Even the more moderate position, that foreign corporations should have the right to do business if they complied with the terms applying to domestic companies, was rejected, on the ground that it "allows a state to keep out foreign corporations" only "upon condition that it shall create none for itself." The constitutional rights of the

by means of agents appointed by them, in this state, effect many insurances within the same, against losses by fire, and otherwise, thereby securing to themselves all the benefits, without being subject to any of the burthens of insurance companies regularly incorporated by law of this state — Therefore," etc.

[1] Ch. 59, 81.

[2] Acts of 1828–29, 264.

[3] Acts of 1824, ch. 277. Reduced to 2 per cent in 1837.

[4] 12 B. Mon. (Ky.), 212 (1851).

incorporators, therefore, had not been violated. And the corporation itself, the Supreme Court had repeatedly held, was not a citizen.

Before this case had appeared in the reports, the Supreme Court of New Jersey came to substantially the same conclusion, though on very different grounds.[1] A statute imposed a license tax on agents of foreign insurance companies, whereas none was imposed on agents of domestic companies. It was attacked under the privileges and immunities clause of the Constitution, counsel quoting opinions of eminent lawyers, including Daniel Webster, and Chief Justice Jones of the New York Superior Court, declaring a similar New York law in conflict with this clause. The court, however, sustained the law. The opinion denies that there is a real discrimination:

> The legislature has seen fit to subject our local corporations to the burthen of very stringent laws, from which foreign corporations are entirely exempt. Can it be successfully contended that the legislature had not a right to say that those stringent provisions were necessary for the safety of the community? And if they had a right to say so, it follows that they had a right to prohibit all corporations which were not in a condition to be subjected to them, from engaging in business in this state. May they not, then, permit upon terms what they might prohibit altogether?

The court adopted, however, the dictum in Bank of Augusta *v.* Earle, that a corporation is not a citizen within the privileges and immunities clause. Elmer, J., who concurred, based his decision entirely on this latter ground, conceding that the privileges embraced in the clause "comprehend an exemption from higher taxes or impositions than are paid by other citizens of the state."

In Slaughter *v.* Commonwealth,[2] the indictment was for conducting an insurance agency for a foreign corporation without a license. The court denied, as did the New Jersey

[1] Tatem *v.* Wright, 3 Zabr. 429 (1852). [2] 13 Gratt. 767 (1856).

court, that the act requiring a license was discriminatory; for since citizens of Virginia could not act as a corporation within the state except by license of the state, it was clearly proper to make the same requirement of members of a foreign corporation. "The general assembly of Virginia alone has authority to say how far the general rules of property and the general law of liability for contracts shall be varied in favor of corporations."

Two lines of thought appear in these decisions: (1) That the regulating statutes do not substantially discriminate against foreign corporations, since they aim only to place burdens on them approximating in severity those to which domestic corporations were subject; (2) That the state can at its own whim exclude any foreign corporation entirely, and hence the corporation cannot cavil at the terms on which it is recognized, however hard and discriminatory. The second theory was upheld to its full extent in a trenchant opinion by Mr. Justice Field in Paul *v.* Virginia. The statute here was of the type to which the New Jersey law of 1826 had belonged, requiring foreign insurance companies to file bonds to a specified amount, as security for the benefit of persons insured. Paul acted as local insurance agent for a foreign insurance company without complying with this provision, and was convicted under the penal clause of the law. On writ of error the judgment of the Virginia Supreme Court, which sustained the conviction, was affirmed by a unanimous court. The court's language has been often quoted:

> The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their consent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely;

they may restrict its business to particular localities or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. [1]

As has been observed,[2] the holding in this case that a corporation has no privileges as a citizen, and that a state may at its discretion exclude it from its boundaries, was not necessary to the decision of the case. Article IV, Section 2, of the Constitution does not require states to place residents and nonresidents on a mathematical plane of equality. Where the fact of nonresidence itself is one of the relevant factors in a legislative problem, clearly a state can meet the situation by a proper classification. The state can require of all business within its borders certain standards of security and responsibility, and it can insist that nonresidents comply with these standards. If the fact of nonresidence makes compliance more difficult, nonresidents can be forced to make greater exertions than are necessary on the part of residents. Thus statutes requiring nonresidents to give security for costs before they may sue, in state courts, are almost universal, and their validity has been frequently upheld.[3] And a statute requiring nonresident owners of automobiles using the state highways to appoint an agent within the state on whom process could be served has been sustained, although no such requirement was made of residents.[4] "It is not a discrimination against nonresidents," declared the court, "denying them equal protection of the law. On the contrary it puts nonresident owners upon an equality with resident owners." The statute involved in Paul *v.* Virginia was clearly of this sort. By providing a

[1] 8 Wall. 168, 181. [2] *Supra*, 64.

[3] Haney *v.* Marshall, 9 Md. 194, 209 (1856); Bracken *v.* Dinning, 140 Ky. 348, 131 S. W. 19 (1910); Miller's Administrator *v.* Norfolk and Western Railroad Company, 47 Fed. 264 (1891).

[4] Kane *v.* New Jersey, 242 U. S. 160 (1916). See Mr. Justice Harlan's opinion in Blake *v.* McClung, 172 U. S. 239, 256 ff.

fund within the state to which suitors could have recourse, it sought to counteract the circumstance that corporations whose main business was conducted out of the state could not be held up to their obligations as easily as domestic concerns. On this ground the law might have been sustained, and it was unnecessary to concede the unrestrained power of a state to discriminate for the mere joy of discriminating.[1]

The doctrine of Paul *v.* Virginia has had a more persistent life than the geographical theory of Bank of Augusta *v.* Earle. In Ducat *v.* Chicago,[2] a 2 per cent tax on the premiums of foreign insurance companies, in addition to the general tax imposed on all insurance offices, was sustained, and the state's power to discriminate to any degree that it pleased reëmphasized. Both this case and Paul *v.* Virginia arose, it should be observed, before the Fourteenth Amendment. However, the cases immediately following carried the doctrine to a more extreme point. Doyle *v.* Continental Insurance Company,[3] involved the power of a state, pursuant to a statute, to expel a foreign corporation from the state because it removed a case to the federal courts. This type of statute was fairly common, and seems to have had its origin in the desire of the states to prevent corporations of other states from taking advantage of the more favorable views on such matters as jurisdiction, entertained by the federal courts. The Supreme Court had decided, in Insurance Company *v.* Morse,[4] that the state law would be ineffectual to prevent removal, if the corporation desired to exercise its federal right. Nevertheless in the Doyle case, the court held that the corporation could be expelled from the state for exercising the right. The court said:

> The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts, or to cease to

[1] See Insurance Company *v.* McMaster, 237 U. S. 63 (1915). *Post*, ch. IX.
[2] 10 Wall. 410 (1870). [3] 94 U. S. 535 (1876). [4] 20 Wall. 445 (1874).

do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any time to declare that it shall not transact business there.

Three justices dissented. The case establishes the full power of the state to expel a foreign corporation, after it is lawfully established in the state, for no reason, or for a bad reason.

The next case carried the doctrine even further. New York, in 1865, passed a law declaring that whenever any other state should require of New York insurance companies the deposit of security, or the payment of a special tax or license fee, then the same requirement should be made of insurance companies of that state, before they should be allowed to do business in New York. In 1872, the defendant, a Pennsylvania company, established an agency in New York. The following year Pennsylvania imposed a discriminating tax of 3 per cent on the premiums of foreign insurance companies. The retaliatory provision of the New York law went into effect, and a suit to recover the tax was instituted by the state. The retaliatory law was held unconstitutional by the New York Supreme Court, but sustained in the Court of Appeals. On writ of error, the United States Supreme Court sustained its constitutionality, only Justice Harlan dissenting.[1] The decision was that a state could discriminate not only between its own corporations and foreign ones, but between the corporations of the several other states. It sanctioned, in the words of Justice Harlan, "a species of commercial warfare by one state against the others." [2]

This was the first case in which the Fourteenth Amendment was expressly invoked, but the court held that it did not modify the doctrine of Paul *v.* Virginia. The court said:

[1] Philadelphia Fire Association *v.* New York, 119 U. S. 110 (1886). [2] *Ibid.*, 129.

This Pennsylvania corporation came into the State of New York to do business by the consent of the state, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute. The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside at the threshold, seeking admission, with consent not yet given.

The decision was reaffirmed and the argument elaborated in an opinion by Mr. Justice Field the following year,[1] upholding a Pennsylvania law placing a discriminatory license tax on all foreign corporations which did not " invest and use " their capital within the state. And five years later,[2] in sustaining a New York tax on all corporations doing business in the state, whether foreign or domestic, measured by the dividends on the par value of the stock, representing both property within the state and without, Justice Field once more and with renewed emphasis proclaimed the principle that " No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the state may require for the grant of its privileges."

The language of the court in Hooper *v.* California [3] seems to go even further. The California Penal Code makes it a misdemeanor for any person within the state to procure insurance for a resident of the state from any foreign insurance company. Hooper was agent for an unincorporated New York firm of insurance brokers, and he transmitted an application for marine insurance to them. They in turn sent

[1] Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181 (1888).
[2] Horn Silver Mining Company *v.* New York, 143 U. S. 305 (1892).
[3] 155 U. S. 648 (1895).

it to a Massachusetts insurance company, the policy was made out and transmitted through them to Hooper, and by him delivered to the owner of the vessel. Hooper was indicted under the Code, and convicted, and this conviction was sustained by the Supreme Court. Mr. Justice White's opinion, in the case, contains the following passage:

> The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company; *and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end.*

The opinion, in the sentence which I have italicized, sanctioned a boycott enforced by state law, against corporations of a sister state not doing business within its boundaries, nor in any way subject to its jurisdiction. Justices Harlan, Brewer, and Jackson dissented. This was, however, the high water mark of the restrictive theory. In Allgeyer *v.* Louisiana,[1] two years later the recession began. The court there held that Louisiana could not constitutionally prevent persons within its jurisdiction from writing to a New York insurance company to secure insurance on their property within the state. This was held to be an unlawful interference with the constitutional liberty of the residents of Louisiana. The power of a state to prevent any person within the jurisdiction from acting as agent for a foreign corporation was, however,

[1] 165 U. S. 578 (1896).

reaffirmed.[1] And the case was not conceived as altering in any way the traditional doctrine. The sweeping language of Paul *v.* Virginia was once more quoted with approval in Waters-Pierce Oil Company *v.* Texas,[2] in 1900, upholding the revocation of a foreign corporation's right to do business in the state on account of violations of the state antitrust laws. In 1906 the Doyle case, permitting explusion of a corporation because it had removed a case to the federal courts, was affirmed, again on the ground that the power of expulsion was absolute.[3] And the same year, in National Council U. A. M. *v.* State Council,[4] the restrictive theory was once more stated in its most drastic form. The defendant was a national fraternal and religious organization incorporated in Pennsylvania. The plaintiff was a Virginia corporation which had once been a state branch of the national Council, but which had effected a schism, and obtained from the Virginia legislature by special act the exclusive right to charter subordinate branches within that state. The case arose on a bill in equity to enjoin the defendant from infringing on this exclusive right. The court upheld a decree in its favor. Mr. Justice Holmes, who rendered the opinion, said:

> But the power of the state as to foreign corporations does not depend upon their being outside of its jurisdiction. Those within the jurisdiction, in such sense as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws. A single foreign corporation, especially one unique in character, like the National Council, might be expelled by a special act. It equally could be restricted in the more limited way.

Until 1906, therefore, it was clearly the doctrine of the Supreme Court that a state might decline to admit a foreign

[1] See the opinion of Chief Justice Holmes, in Commonwealth *v.* Nutting, 175 Mass. 154, 156, quoted in Nutting *v.* Massachusetts, 183 U. S. 553, 558 (1902), pointing out the distinction clearly.

[2] 177 U. S. 28.

[3] Security Mutual Life Insurance Company *v.* Prewitt, 202 U. S. 246 (1906).

[4] 203 U. S. 151 (1906).

corporation arbitrarily or even from a motive contrary to the general purposes of the Constitution; that it might admit it on conditions which result in burdensome discriminations between it and domestic corporations, and even between corporations of other states; and that it might admit it on one set of conditions, and then without cause impose another and more burdensome set of conditions. The state's attitude toward these " bodies politic " established under foreign law was, in the language of Mr. Justice Peckham,[1] one of those " governmental subjects," regarding which state legislation was virtually unhampered by the limitations of the Fourteenth Amendment.

The past decade has seen an almost complete disintegration of that doctrine. In a series of cases which begins in 1910, the Supreme Court has sanctioned, in later cases unanimously, no less than three important qualifications of the state's constitutional power of excluding or expelling foreign corporations. The principles on which these qualifications rest are: (1) That a so-called " unconstitutional condition " to the admission of a foreign corporation cannot be enforced by expulsion or indictment. (2) That a foreign corporation, being a person, is protected against arbitrary expulsion by the due process clause of the Fourteenth Amendment. (3) That a foreign corporation may, under certain circumstances, become a " person within the jurisdiction " entitled under the Fourteenth Amendment to a certain degree of equality of treatment with domestic corporations. A treatment of the development and scope of these principles must be reserved for a later chapter. In the meantime there remains to be examined a well established and long recognized exception to the doctrine of Paul *v.* Virginia, founded on the Commerce Clause of the federal constitution.

[1] Mutual Life Insurance Company *v.* Spratley, 172 U. S. 602, 620 (1899).

CHAPTER VII

FOREIGN CORPORATIONS AND THE COMMERCE CLAUSE

THE first encroachment of the liberal theory of foreign corporations in American constitutional law was made under the Commerce Clause of the federal Constitution. Today it seems a very obvious matter that a foreign corporation engaged in interstate commerce cannot be kept out of the state, yet the proposition was not established without a struggle. It is a fact often overlooked that the decision in Gibbons *v.* Ogden,[1] that a state-granted monopoly of navigation was invalid as against persons engaged in interstate or foreign commerce, was at that time supposed to be applicable only to water navigation.[2] A large part of the inland transportation at that time was in the hands of state-granted corporate monopolies, of stagecoach, ferry, turnpike or canal companies. Monopolies of this sort might often afford the only means of transportation available between two states; yet in his argument in Gibbons *v.* Ogden, Webster conceded as obviously true, that they were valid despite the commerce clause.[3] There were exclusive grants of this character well up to the Civil War.[4] The grant by New Jersey to the Camden and Amboy Railroad Company of a monopoly of all traffic passing through the state from New York to Philadelphia was sustained by the state

[1] 9 Wheat. 1 (1824).

[2] See Mr. Prentice's illuminating treatment of Gibbons *v.* Ogden in *Federal Control over Corporations*, ch. III.

[3] 9 Wheat. 1, 18.

[4] See, for instance, Veazie *v.* Moor, 14 How. 568 (1852). Conway *v.* Taylor, 1 Black. 603 (1861).

courts as late as 1867.[1] The older view was strikingly shown in the opinion of Mr. Justice Bradley, in Railroad Company *v.* Maryland,[2] (later overruled) sustaining a state regulation of interstate railroad rates. The court conceded, of course, the exclusive power of Congress over navigation:

> But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair and management, to state regulation and control. They were all made either by the states or under their authority. The power of the state to impose or authorize such tolls as it saw fit, was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to National regulation.

There is an interesting discussion of the effect of the Commerce Clause on the doctrine of Bank of Augusta *v.* Earle in an early case in New Jersey, in which Chief Justice Beasley delivered the opinion.[3] The state had imposed a tax on all foreign corporations engaged in transportation across the New Jersey border. The court held the tax unconstitutional. To the argument that the state could impose terms as a condition of recognizing the foreign corporations, it replied:

> It is readily to be admitted that a law imposing certain terms upon all foreign corporations as conditions precedent to their acquisition in this state of the right to act in the unity of their corporate existence, would be legal. Such law would prevent foreign persons from doing any legal act in this state as a corporation, but can it be maintained that such law would have the further effect of leaving the property of the company as the spoil of the first taker? A statute that should

[1] Camden and Amboy Railroad Cases, 15 N. J. Eq. 13 (1862); 16 *Id.*, 321 (1863); 18 *Id.*, 546 (1867). The monopoly was overthrown in the Supreme Court in 114 U. S. 196.

[2] 21 Wall. 456, 470 (1874). Overruled in Wabash, St. Louis and Pacific Railway Company *v.* Illinois, 118 U. S. 557 (1886).

[3] Erie Railway Company *v.* The State, 31 N. J. L. 531, 543 (1864).

abolish the rule of comity, and should refuse a recognition of foreign corporations, would, it is conceived, have this effect and no more, *i. e.*, to convert the foreign corporators, as to the state enacting the supposed law, into a partnership of individuals; and thus, although the corporation, as such, could not by suit or otherwise, assert its right to protect its property, the members of the company would be under no such disability.

The court was unwilling, therefore, to grant the corporation on its own account rights under the Commerce Clause and under the state constitution, but looked to the rights of the individual corporators, just as Chief Justice Marshall had looked to the citizenship of the corporators to give the federal courts jurisdiction.

That corporations have constitutional rights under the Commerce Clause on their own account was settled by the opinion of Mr. Justice Field in Paul *v.* Virginia. It was there contended that the sending of policies of insurance from one state to another was interstate commerce, and could not be hampered by the state. The court said:

It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce.

The attempted analogy here was to the sale of commodities between states, which, though inland, was concededly within the Commerce Clause.[1] It was in Pensacola Telegraph Company *v.* Western Union Telegraph Company [2] that the real struggle between the state transportation monopolies and the Commerce Clause took place. An Act of Congress of July 24, 1866, authorized any telegraph line which accepted certain conditions, to operate lines along any

[1] Woodruff *v.* Parham, 8 Wall. 123 (1868). [2] 96 U. S. 1 (1877).

military or post road of the United States. An act of the Florida legislature, of December 11, 1866, incorporated the Pensacola Telegraph Company, giving it a monopoly of the telegraph business in two counties of the state, " either from different points within said counties, or connecting with lines coming into said counties, or either of them, from any point in this or any other state." Seven years later the legislature repudiated this exclusive grant, and gave the Pensacola and Louisville Railroad the right to build telegraph lines along its right of way. This franchise was, with legislative permission, assigned to the Western Union. The Pensacola sought an injunction, claiming that its original grant was valid and the subsequent grant an unconstitutional impairment under the Contract Clause. The court held that the first grant, in so far as it conferred an exclusive right to send messages in interstate commerce, was invalid, under the Commerce Clause and the Act of Congress.

Mr. Justice Field delivered a forceful dissent, asserting the power of a state to grant transportation monopolies within its borders beyond the control of Congress. " By the decision now rendered," he said, " congressional legislation can take this control from the state, and even thrust within its borders corporations of other states in no way responsible to it. It seems to me that in this instance, the court has departed from long-established doctrines, the enforcement of which is of vital importance to the efficient and harmonious working of our national and state governments." The dissent is the more interesting because it was written by the Justice who wrote most of the leading cases on the law of foreign corporations in the Supreme Court during the quarter century following the Civil War, and who, more than any other member of the court, is generally identified with the traditional American doctrine of foreign corporations.[1] His dissent was

[1] See Paul *v.* Virginia, 8 Wall. 168 (1868); St. Clair *v.* Cox, 106 U. S. 350 (1882); Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181 (1888).

not solely based on the circumstance that the case involved a local transportation monopoly, which he considered beyond Congressional power. Even if it had been a corporation engaged in selling goods from one state to another a business clearly within the federal jurisdiction, he would have conceded to the state the power to prevent the corporation establishing itself within its boundaries. "The position advanced, that if a corporation be in any way engaged in commerce, it can enter and do business in another state without the latter's consent, is novel and startling. There is nothing in the opinion in Paul *v.* Virginia which gives any support to it." [1]

With the denial of the right to exclude, there fell to the ground, as to these corporations, the whole traditional theory by which state regulation of foreign corporations had been justified. For if the right to exclude is denied, the right to admit on condition necessarily falls with it. Thenceforth, if the state was to regulate foreign corporations engaged in interstate commerce, it must be as a lawmaker with qualified legislative jurisdiction, not as a person making a bargain, who may exact whatever price he can get. To trace the subsequent development of this new theory would be to write a history of the Commerce Clause and would take us far beyond the field of this essay. Most of the principles which delimit the sphere of state legislation over corporations engaged in interstate commerce are as applicable to domestic as to foreign corporations; and they have been often and ably discussed. All that can be attempted here is to sketch in outline such of these principles as have most profoundly influenced the general law of foreign corporations. This much is necessary, for some of the most revolutionary developments of the law of foreign corporations have been so closely entangled with the law of interstate commerce that they cannot be separately treated.

[1] 96 U. S. 1, 15, 21.

Primarily, the effect of the Commerce Clause has been to place on the Supreme Court the duty of balancing and adjusting national and local interests. In certain of its aspects commerce between the states is of national concern and subserves national interests. In other aspects it comes in contact with local interests. From the nature of the problem no logical delimitation is possible. "We have no second Laplace, and we never shall have, with his Méchanique Politique, able to define and describe the orbit of each sphere of our political system with such exact mathematical precision. There is no such thing as arranging these governments of ours by the laws of gravitation, so that they will be sure to go on forever without impinging." [1] Not only is commerce between the states, as the court has so often said, a practical conception, drawn from the course of business,[2] but the extent of the state's power over interstate commerce must be determined with an eye to a "practical adjustment" of national and local authority.[3] Hence formulas and doctrines have been avoided; the Supreme Court has developed a technique and a method of approach rather than a set of principles. In so doing it has exercised functions which, it must be admitted, are often more nearly legislative than judicial; yet this is a difficulty inherent in the nature of the problem.

The taxing power of the state has presented this conflict of interests in its most acute form; and has been the most prolific source of litigation in this field. The state's interest in controlling its own policy of taxation over property within its boundaries is of course a vital one. The nation's interest in preventing the obstruction of interstate commerce and the impairment of the instrumentalities of interstate commerce is even more vital. In the practical adjustment of these two

[1] Daniel Webster, in Bank of Augusta *v.* Earle, 13 Pet. 519, 549 (1839).

[2] Swift and Company *v.* United States, 196 U. S. 375, 398; Rearick *v.* Pennsylvania, 203 U. S. 507, 512; Savage *v.* Jones, 225 U. S. 501, 520.

[3] Mr. Justice Hughes, in Minnesota Rate Cases, 230 U. S. 352, 431 (1913).

interests, two elements are involved: the amount and measure of the tax must be such that it does not put an unnecessary burden on interstate commerce; and the method of enforcement must not seriously interfere with the course of interstate commerce.

As to the first element, an important safeguard of national interests is the principle of equality. A state may not in its taxation discriminate against interstate commerce. A license tax applicable to persons selling imported goods, and not to those selling domestic goods, is invalid;[1] but a license tax on exchange brokers which makes no distinction between exchange relating to foreign or interstate commerce and domestic commerce, is valid.[2] A license tax on all peddlers in the state is of course valid; but a tax only on peddlers of goods manufactured in other states is invalid.[3] Even a tax imposed only on goods made from raw products of other states is invalid.[4] Practically, this safeguard is a most important one, for legislators will often hesitate to put an undue tax on interstate commerce, if they must at the same time similarly burden their constituents.

But this safeguard proved insufficient. A tax which adhered to the principle of equality in form, might in substance bear unequally on interstate commerce. Especially was this true of license and business taxes. In exercising the almost unlimited power of classification with respect to this kind of taxes, the legislature might pick out as a target for special exactions a business which happened to be almost entirely of an interstate character. It might impose on this business a tax in terms applicable to domestic as well as interstate business; yet the restraining influence of an affected local

[1] Brown *v.* Maryland, 12 Wheat. 419 (1827).

[2] Nathan *v.* Louisiana, 8 How. 73 (1850).

[3] Welton *v.* Missouri, 91 U. S. 275 (1875); Webber *v.* Virginia, 103 U. S. 344 (1880).

[4] Darnell Company *v.* Memphis, 208 U. S. 113 (1908).

constituency would be so slight as to place no reasonable limit on the amount of the tax. Theoretically, the court might have gone behind the power of classification, and inquired into the motive of classification,[1] but the practical difficulties would have been enormous. Instead, it took the more drastic step of condemning all business and license taxes on interstate commerce, even though they were nondiscriminatory. Thus a license tax on all persons selling goods by sample within the taxing district was condemned, though not without dissent.[2] Transportation agencies presented the evil which this new departure was designed to meet, to a serious degree. Before the days of effective regulation, wealthy transportation corporations were objects of jealousy. Much of their wealth represented property in other jurisdictions and a great part of their business was interstate. At first the court seems to have considered that the economic incidence of taxation determined the validity of business or license taxes on interstate transportation agencies. A tax on freight tonnage, though nondiscriminatory as between local and domestic traffic, was held unconstitutional, on the ground that it plainly contemplated that the burden would be shifted to the shipper.[3] But a tax on gross receipts [4] and a license tax of a fixed sum [5] were sustained. These cases were, however, soon overruled. It is now clear that no tax which is in substance a tax on the right to do business, rather than a tax on property, can be imposed on a person or corporation engaged in interstate commerce, even though a like tax is imposed on local business.[6]

[1] There is a suggestion of this method of approach in Robbins *v.* Shelby County Taxing District, 120 U. S. 489 (1887).

[2] Robbins *v.* Shelby County Taxing District, *supra*, note 1.

[3] Case of State Freight Tax, 15 Wall. 232 (1872).

[4] State Tax on Railway Gross Receipts, 15 Wall. 284 (1872).

[5] Osborne *v.* Mobile, 16 Wall. 479 (1872).

[6] Gloucester Ferry Company *v.* Pennsylvania, 114 U. S. 196 (1884); Leloup *v.* Port of Mobile, 127 U. S. 640 (1888); Crutcher *v.* Kentucky, 141 U. S. 47 (1891).

Perhaps the name of this class of taxes had something to do with the adoption of so drastic a rule. A license tax implies the grant of a privilege to do business, in return for a fixed annual payment. It harks back to the days of feudal exemptions and immunities. A state license tax on interstate commerce seemed to imply a right in the state to grant the privilege of carrying on interstate commerce, a right which, of course, it did not possess. This is the ground on which the cases have generally been put. There is probably little of substance in this argument. Whatever it may be in name, a license tax is in fact a command to pay a certain sum of money. It can be avoided by not engaging in the business; but so can a property tax be avoided by not owning property. The substantial question is whether the sum of money can be rightly demanded, not whether its name implies a claim of power which the state does not possess. If the state should go further and order the delinquent taxpayer to cease carrying on interstate commerce till he had paid his tax, another question would arise. This would involve the second of the two elements I have mentioned, namely whether the method of enforcement does not too seriously interfere with interstate commerce.

Literally applied, however, this new principle went too far. Many of the large public service corporations, railroads, telegraph companies, express companies, possessed a value far above that of their actual tangible property. Merely to assess their roadbed, rolling stock, telegraph poles and wires, offices and wagons, would leave out of account the vast amount of property of an intangible sort representing their value as a going concern. Logically, it would not have been unreasonable to consider this so-called " corporate excess " as the value conferred on the corporations by their federal franchise to do business, *i. e.*, the Commerce Clause, and hence to have exempted it from taxation by the state. It was

apparent, however, that such a rule would in all probability lead to its escaping all taxation. However this may be, the rule was established, though not without a struggle, that the state could consider this corporate excess as local property, or as enhancing the value of local tangible property, and tax it, even though it represented value growing out of interstate commerce. But of course only so much of this corporate excess was taxable as fairly represented business within the state. How to measure its value was recognized as a practical question. Good faith and reasonableness, rather than mathematical accuracy, were called for. A Pullman company could be taxed by taking a proportion of the value of its capital stock fixed by the ratio of the miles of railroad track over which it operated within the state to the total mileage.[1] The corporate excess of a railroad could be assessed on the same basis.[2] For a telegraph company, the mileage of wires within the state was on the whole a reasonable criterion.[3] In the case of an express company, the value of the tangible property within and without the state seemed the only practical basis.[4] Where, however, the property was not of uniform value, where for instance valuable terminal properties in one state made a ratio based on mileage unfair, the court required an adjustment accordingly.[5]

This step, however, pointed to another danger. Even though the state did not reach out beyond its boundaries and attempt to tax values not referable to its share of the corporation's business, it might yet, in the guise of a property tax on the corporate excess, impose what was in substance a license tax on the interstate business, of the kind which had

[1] Pullman's Car Company *v.* Pennsylvania, 141 U. S. 18 (1890).

[2] Pittsburgh Railway Company *v.* Backus, 154 U. S. 421 (1894).

[3] Postal Telegraph Cable Company *v.* Adams, 155 U. S. 688 (1895); Western Union Telegraph Company *v.* Taggart, 163 U. S. 1 (1896).

[4] Adams Express Company *v.* Ohio, 165 U. S. 194 (1897).

[5] See Fargo *v.* Hart, 193 U. S. 490 (1904).

been previously condemned.[1] It might for instance impose, on the tangible and intangible property within the state, a tax " equal to " one per cent of the gross receipts of all business done in the state. Such a tax the Supreme Court recently condemned, by a five to four decision.[2] The court admits, however, that the distinction between such a tax, and one which distributes the corporate excess according to mileage or property, is largely psychological:

> It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can.

The bearing of all this on the law of foreign corporations is obvious. The traditional theory of taxation of foreign corporations, that a state could exact any price it pleased as a condition of the right to do business within the state, could not be invoked where the corporation was engaged in interstate commerce. There could be no license tax of any sort; and property taxes could not discriminate against interstate commerce. The corporate excess could be taxed within the state; but only such proportion as was properly referable to property within the state, and only when measured without direct reference to the interstate business.

[1] Case of State Freight Tax, 15 Wall. 232 (1872); Fargo *v.* Michigan, 121 U. S. 230 (1887); Philadelphia Steamship Company *v.* Pennsylvania, 122 U. S. 326 (1887).

[2] Galveston Railway Company *v.* Texas, 210 U. S. 217 (1908). See also Meyer *v.* Wells, Fargo and Company, 223 U. S. 298 (1912); United States Express Company *v.* Minnesota, 223 U. S. 335 (1912).

The cases hitherto considered have turned on the amount and measurement of the tax, whatever its name. The protection of the Commerce Clause, however, extends to another element also; the enforcement of the tax. It seems that even a reasonable and properly measured tax cannot be enforced against an interstate corporation by any mode which seriously hampers its interstate business. Thus in Western Union Telegraph Company *v.* Massachusetts,[1] the tax, properly proportioned with reference to the distribution of mileage, was sustained. But the state law authorized the court to enjoin the corporation's doing any business within the state until it should pay the tax; and this was held a violation of the Commerce Clause. Quite recently this principle has been reaffirmed.[2]

So much for taxation; regulation, also, has produced its crop of problems. And here the difficulties are more distinctly peculiar to the law of foreign corporations. Despite the Commerce Clause, a state retains a certain degree of control over its own corporate creatures, even though they are engaged in interstate or foreign commerce. It has power to provide for the security of its stockholders, for the details of corporate management, for the suability and solvency of the corporation. This is an anomaly which will remain till by federal incorporation the national interest in these matters is vindicated. But the interests which these regulations seek to subserve exist in every state in which the corporation does business. It is as important to a state to provide for the suability, the proper conduct and solvency of foreign corporations in the state as of domestic ones. To what extent can these local interests be satisfied?

In considering the cases in which these questions have arisen, it is important to bear in mind the two elements which

[1] 125 U. S. 530 (1888).

[2] St. Louis Southwestern Railway Company *v.* Arkansas, 235 U. S. 350 (1914).

we have found in the taxation cases: the nature of the duty imposed on the foreign corporation, and the method of enforcing the duty. Certain requirements cannot be enforced at all against foreign corporations engaged in interstate commerce; others, reasonably aimed at securing meritorious local interests without seriously hampering interstate commerce, may be exacted; but the method of enforcement must be such that interstate commerce is not seriously disturbed.

Subjecting the foreign corporation to the jurisdiction of state courts is an example of reasonable state regulation of interstate commerce. The traditional theory of jurisdiction over foreign corporations, indeed, leaves one in somewhat of a dilemma. If jurisdiction over foreign corporations is founded wholly on a presumed agreement by which the state allows the corporation to do business within its borders in return for the absent corporation's consent to service on its agents,[1] the state cannot get jurisdiction at all over a corporation engaged in interstate commerce, even though it has offices in the state and the great bulk of its business is there conducted. This " novel proposition " was urged before the Supreme Court quite recently; and it is not surprising that it was rejected with scant ceremony.[2] Of course it merely demonstrates the uselessness of the geographical theory of the corporation's presence. Referring to the decisions permitting a state to attach cars engaged in interstate commerce,[3] or to enforce liens on vessels similarly employed,[4] the court observed that a suit was no more of a burden than these.

This decision involved the power of the state to authorize service of process on a representative officer of the corporation. Can the state require a foreign corporation engaged in

[1] *Supra*, 81ff.

[2] International Harvester Company *v.* Kentucky, 234 U. S. 579 (1914).

[3] Davis *v.* Cleveland Railway Company, 217 U. S. 157 (1910).

[4] The Winnebago, 205 U. S. 354 (1907).

interstate commerce to appoint a resident agent on whom all process can be served, with a known place of business at which he can be found? The cases have left the matter in some doubt. The language of some state and federal decisions indicates that this is an unreasonable burden.[1] On the other hand Alabama has sustained such a law, on the theory that it is "just as much a police regulation for the protection of the property and interests of its citizens as a law forbidding vagrancy among its inhabitants."[2] The matter came before the Supreme Court in International Text Book Company *v.* Pigg.[3] The corporation maintained a soliciting agent in Kansas, who entered into a contract on behalf of the corporation which, the court held, related to a transaction of interstate commerce. The corporation sued on this contract, and the defense was that it was debarred from suing because it had not complied with the requirements of the Kansas foreign corporations law. This law required, as a condition precedent to the right to do business or to sue in the courts, the filing of certain statements as to capital stock, charter powers, etc., and the appointment of an agent to accept service of process. The state court held that the corporation was debarred from suing; and the United States Supreme Court reversed the decision. The opinion leaves the question open whether a corporation engaged in interstate commerce can be required to appoint an agent. It goes on the ground that the Kansas law made the requirement a condition of doing business in the state; in other words that the method of enforcement was too drastic. Two later cases involving the same point go on the same ground.[4] In Sioux Remedy Com-

[1] See Ryman Steamboat Line Company *v.* Commonwealth, 30 Ky. L. Rep. 1276, 101 S. W. 403 (1907); New Orleans Packet Company *v.* James, 32 Fed. 21 (1887).

[2] American Union Telegraph Company *v.* Western Union Telegraph Company, 67 Ala. 26 (1880).

[3] 217 U. S. 91 (1910).

[4] International Text Book Company *v.* Lynch, 218 U. S. 664 (1910); Buck Stove Company *v.* Vickers, 226 U. S. 205 (1912).

pany *v.* Cope,[1] the state statute made the right of a foreign corporation to bring suit on any transaction within the state conditional on its appointing an agent to receive process. The corporation made a contract relating to interstate commerce, and brought suit on it, without complying. The Supreme Court held that the suit must be entertained. But here again the opinion of the Supreme Court makes it clear that it was the method of enforcement that was objectionable:

> The right to demand and enforce payment for goods sold in interstate commerce, if not a part of such commerce, is so directly connected with it and is so essential to its existence and continuance that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden upon interstate commerce.

By "unreasonable" conditions, the court indicates, it means conditions not related to procedure and costs in the courts, or not designed to guard against abuse of judicial process.

The question is therefore still an open one; and on principle, in the absence of congressional action, such regulations seem to be eminently reasonable. The burden on the corporation is not a heavy one; and the protection to the citizens of the state considerable. They must not be enforced by expulsion, or by closing the courts to the corporation on causes of action growing out of interstate commerce, or, it would seem, by declaring its contracts void,[2] but a reasonable method of enforcement, such as a moderate fine, should be upheld. On the other hand such a requirement as that contained in Crutcher *v.* Kentucky,[3] cannot be enforced against a corporation engaged in interstate commerce by any means. The state law in this case forbade any foreign corporation

[1] 235 U. S. 197 (1914).

[2] United States Rubber Company *v.* Butler Brothers, 156 Fed. 1 (C.C.A. 1907); Kinnear and Gager Company *v.* Miner, 89 Vt. 572, 96 Atl. 333 (1916). Many other cases could be cited.

[3] 141 U. S. 47 (1891).

from doing an express business within the state unless it could prove to the proper state official that it had a capitalization of at least $150,000. This is an absolute prohibition, as to certain corporations. Similarly it seems to be settled, at least since the enactment of the Sherman Law, that state antitrust laws cannot impose burdens on the interstate business of foreign corporations. If they have done acts in the course of local commerce in violation of state laws, they can be enjoined from carrying on local business within the state; but their interstate business cannot be enjoined, as part of the punishment, nor can the jury take into account acts in the course of interstate business in determining whether the law has been violated.[1]

A foreign corporation engaged in interstate commerce almost invariably, in addition to its interstate activities, does some business of a purely local character. What is the status of this local business? Does the doctrine of Paul *v.* Virginia, that the state can exclude it at will, apply? The Supreme Court for some time held without question that it does. In Osborne *v.* Florida,[2] a state law imposed a license fee of $200 on all foreign express companies doing business in cities of a certain size. The state court construed this to be a license on the local business, only, and sustained the tax; and the United States Supreme Court affirmed the decision, despite the argument that 95 per cent of the corporation's business was interstate, and that the tax was really imposed on account of it. The states were quick to grasp at the opportunity. In Pullman Company *v.* Adams,[3] the state had imposed a tax on all sleeping and palace car companies "carrying passengers from one point to another within the state," of $100, plus twenty-five cents per mile of railroad

[1] See Waters-Pierce Oil Company *v.* Texas, 177 U. S. 28 (1900); International Harvester Company *v.* Missouri, 234 U. S. 199 (1914). State *v.* Standard Oil Company, 218 Mo. 1 (1909).

[2] 164 U. S. 650 (1897).

[3] 189 U. S. 420 (1903).

track within the state. The tax was again sustained, on the assumption that the state laws would be so construed as to permit the corporation to abandon its local business if it desired. " The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The principle was affirmed once more in Allen *v.* Pullman Company.[1]

Perhaps if the states had contented themselves with the relatively moderate license taxes imposed in these three cases, the matter would have rested there. But Kansas tempted fate by requiring all foreign corporations as a condition of the further exercise of the right to do local business within the state, to pay a charter fee of a certain per cent of its total capital stock. The Western Union and the Pullman Company refused to pay the fee, and the state officials cancelled their permit to do local business within the state. They appealed to the Supreme Court to sustain an injunction against the state officials,[2] and by a five to four decision, the Supreme Court upheld their contention. Mr. Justice Harlan, with whom three justices concurred, based his decision on the proposition that the tax in substance was on the interstate business. He conceded the traditional doctrine that a state could exclude even interstate corporations absolutely as to their local business. But he denied the right of the state to use this power of exclusion as a means of bringing pressure to bear on the corporation to pay a tax measured by its interstate business. To this argument Mr. Justice Holmes, who dissented, speaking also for three other justices, answered that so long as the corporation could not complain of an absolute exclusion from local business it could not complain of a qualified exclusion. " Even in the law, the whole usually includes the part." If the corporation does not want to pay

[1] 191 U. S. 171 (1903).

[2] Western Union Telegraph Company *v.* Kansas, 216 U. S. 1 (1910); Pullman Company *v.* Kansas, 216 U. S. 56 (1910).

the tax, it can renounce its local business. If the state has an absolute and arbitrary power to exclude a corporation, a bad reason cannot nullify that power. He asks what the court would do if the State of Kansas, the following year, were to simply prohibit the company's doing business in the state till it had paid $20,100 (the amount in dispute) without giving any reason.

Mr. Justice White, who concurred in the Telegraph case on the ground that the tax and the expulsion deprived the corporation of property without due process in violation of the Fourteenth Amendment, answered this challenge in his concurring opinion in the Pullman case, in which the decision of the court was announced at the same time. He drew a distinction between an absolute power to exclude, and a relative power. The absolute power, a power to exclude as to all business and for any reason, exists as to purely intrastate businesses. As to corporations engaged in part in interstate commerce, the power is only relative, that is, it can be exerted only as to the intrastate business, and for a good reason. Hence, in the latter case, a decree of ouster either for a bad reason *or for no reason at all*, would be an unwarranted assumption of power. The argument seems fallacious. "Absolute" power is used in two senses: It is a power to exclude as to all business; and it is also a power to exclude for any reason. As to corporations conducting only local business, the power exists in the first sense, and also in the second. As to interstate corporations, since it does not exist in the first sense, therefore, the argument is, it cannot in the second. Or, to restate the matter more nearly in Mr. Justice White's language, to exclude a corporation for no reason, or for a bad reason, is a claim of absolute power. But an absolute power is a power to exclude as to all business, interstate and intrastate alike. That claim is invalid. Therefore the state is justifying an illegal result by an unconstitutional

claim of absolute power and two wrongs cannot make a right. The query seems warranted how the mere application of the same name to two different claims of power can make those two claims so identical that a state cannot assert one without asserting the other!

It will be observed that these cases really involved two separable questions, the validity of the tax, and the validity of the expulsion. Of the five Justices who made up the majority, only Mr. Justice White was willing to go so far as to say that a state could on no account deprive an interstate corporation of the sort there involved of the right to do local business; and he did not rely on this argument. To have so held would have placed the decision on logically unassailable ground; and it would not, it is submitted, have involved a very radical departure from existing principles. As legal concepts, interstate and intrastate commerce may be distinct and separable. Dialectically, the " right " to engage in interstate commerce need not include the " right " to carry on local business. But if, as a matter of business experience, an interstate railroad cannot be properly conducted without deriving some revenue from local business, to cut off that revenue does in fact interfere with economical railroading. It is not the bare power to carry on interstate commerce that the Constitution guarantees. It is the power to carry it on in a normal, business-like way. It is, for example, entirely possible for a group of citizens to carry on commerce between the states without incorporating; but incorporation is nevertheless, in the language of the court, " a convenience in carrying on their business " of which the state cannot deprive them.[1] The local business of an interstate corporation is, of course, subject to state regulation to a greater degree than the interstate business. It is subject to a reasonable local business tax, or to the local antitrust laws. These

[1] Crutcher *v.* Kentucky, 141 U. S. 47 (1891).

are regulations reasonably adapted to subserving local interests. But it is to be doubted whether the power of expulsion is necessary to carry out these legitimate purposes. Mandamus, injunction, and indictment are always available, and would generally be adequate.

If this view is not taken, and there is at least a dictum in a later case against it,[1] the Telegraph and Pullman cases cannot, it seems to me, be sustained on any ground which is not equally applicable to corporations not engaged in interstate commerce. To say that these corporations cannot be expelled, as to their local business, for a bad reason, is to beg the whole question, for if the power of expulsion exists, the power exists to exact any pecuniary compensation as a condition of admission, and the refusal of the corporation to pay that compensation is *not* a bad reason. It can be termed a bad reason, only if the interstate business is by virtue of the Commerce Clause deemed entitled to a reasonable contribution on the part of the local business, toward the payment of the fixed charges; or, on the other hand, if the local business is entitled on its own account, to constitutional protection against arbitrary exactions.

[1] See St. Louis Southwestern Railway Company *v.* Arkansas, 235 U. S. 350 (1914).

CHAPTER VIII

THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

If all business could be divided into interstate and foreign commerce, on the one hand, and business of purely local significance on the other, the constitutional status of foreign corporations in the United States would present a relatively simple problem. Activities which fell within the first category would be protected against discriminatory legislation by the Commerce Clause. As to the second category, the doctrine of Paul *v.* Virginia, giving the state free reign in its treatment of foreign corporations, would not have led to unjust results. If the business is purely local, if it bears no economic relation to business in other states, there is no hardship in saying that if it is to be conducted in corporate form at all, it should be by domestic corporations. It is the existence of a third category which has made the problem acute; a category comprising a large amount of business of national scope and significance which is not protected by the Commerce Clause. There is in the first place interstate business which is not commerce at all. Insurance, necessarily conducted on a national scale, is a notable example. Since Paul *v.* Virginia, the Supreme Court has steadfastly adhered to the position that this is not commerce, despite repeated attempts to secure a reversal.[1] Again there is much business which, while organized on a national scale, by corporations carrying on activities in a number of states, nevertheless does not comprise the shipping of commodities across state

[1] New York Life Insurance Company *v.* Deer Lodge County, 231 U. S. 495 (1913), was the latest, and probably the most formidable, attempt to persuade the court to extend the protection of the Commerce Clause to insurance. The previous cases are reviewed in detail.

boundaries. Retail chain stores, now an increasingly important economic phenomenon; construction companies, which send men and equipment into other states to erect buildings or bridges; manufacturing companies, which maintain local agencies in various states to repair the products which they have sold; these are common examples.

As to foreign corporations engaged in these and similar types of business, as we have seen, the Supreme Court was in 1906 still emphatically committed to the doctrine that the state could arbitrarily exclude or expel the corporation at will, or admit it subject to whatever conditions it saw fit to impose. As the number and importance of these corporations increased, increasingly large property values, tangible and intangible, were by reason of this doctrine exposed to discriminatory state legislation, and subject to arbitrary impairment or even destruction. Increasingly urgent attempts were made to induce the Supreme Court to recede from its position, and give these property values constitutional protection.

How strongly the injustice of taxes which discriminate against foreign corporations appealed to the Supreme Court may be seen from a case decided in 1907. The Colorado foreign corporation law admitted foreign corporations on the condition that they be subjected " to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers." Domestic corporations had at this time a limited life of twenty years. With this law in force, a New Jersey corporation engaged in business in the state, and invested money there. The law was then amended, by requiring of all domestic corporations a fee of two cents per $1000 capital stock, and of all foreign corporations, a fee of four cents per $1000. This tax the court held invalid, as impairing the obligations of a contract,

implied in the original statute, not to tax foreign corporations, for a period of twenty years, more severely than domestic corporations.[1] It seems impossible to support this contention. As a matter of English, "all the liabilities" does not mean "only such liabilities"; and the oft-repeated declaration of the Supreme Court that a permit to a foreign corporation to do business within the state is no more than a license revocable at will, makes it most improbable that the parties had any such agreement in mind. Four Justices dissented, without opinion, and although the case has since been pressed upon the court in argument, it has never been followed.

Finally, however, a loophole in the seemingly iron-clad doctrine of Paul *v.* Virginia was found in a cautious phrase which the Supreme Court had been accustomed to add in its declaration of that doctrine, almost since it had first been formulated, namely, that the conditions with which the state qualified its admission of foreign corporations must not be "repugnant to the Constitution or laws of the United States."[2] This phrase seemed at first entirely lacking in definite meaning. Literally taken, it was an empty tautology — a mere statement that a condition which was unconstitutional was invalid. It avoided the crucial question whether any condition could be unconstitutional, as long as the corporation was at liberty to avoid it by staying out of the state.

The phrase began to take on a more definite meaning in the series of cases, already alluded to,[3] involving the validity of state legislation designed to prevent foreign corporations resorting to the federal courts. It was early established, as we

[1] American Smelting and Refining Company *v.* Colorado, 204 U. S. 103 (1907). Cf. New York Railroad Company *v.* Pennsylvania, 153 U. S. 628 (1894).

[2] Lafayette Insurance Company *v.* French, 18 How. 404, 407 (1855); Ducat *v.* Chicago, 10 Wall. 410, 415 (1870); Insurance Company *v.* Morse, 20 Wall. 445, 456 (1874); St. Clair *v.* Cox, 106 U. S. 350, 356 (1882); Philadelphia Fire Association *v.* New York, 119 U. S. 110, 120 (1886).

[3] *Supra*, 106.

have seen, that an agreement by a foreign corporation, made under duress of state law, would be ineffectual to prevent removal to the federal courts, if the corporation saw fit to repudiate the agreement.[1] But the state was permitted, in Insurance Company *v.* Doyle,[2] to punish the corporation by expulsion from the state if it chose to avail itself of this constitutional privilege. It was in a dissent from this decision, written by Mr. Justice Bradley, that the doctrine of unconstitutional conditions first made its appearance in concrete form. Mr. Justice Bradley said:[3]

> Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister states; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other.

Seven years later, in Barron *v.* Burnside,[4] it seemed for a moment as if the whole Supreme Court had adopted this novel doctrine. The state statute made it a criminal offense to act as agent for any foreign corporation which failed to file a stipulation agreeing not to resort to the federal courts. An agent was indicted for violating this act, and in the Supreme Court his conviction was reversed, the court declaring that " no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States." The court said that all that the Doyle case really decided was " that as the state had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it." It was generally understood,

[1] Insurance Company *v.* Morse, 20 Wall. 445 (1874).
[2] 94 U. S. 535 (1876). [3] *Ibid.*, 543. [4] 121 U. S. 186 (1887).

however, that the Doyle case was overruled. The doctrine of Barron *v.* Burnside, that a law imposing this sort of a condition precedent to the corporation's entrance was void and of no effect, was reiterated by the Supreme Court in several dicta, during the years following,[1] and was acted upon several times in the Circuit Courts of Appeal.[2]

Yet only nine years later, after elaborate argument and on full consideration, the court once more returned to the position taken in the Doyle case. In Security Mutual Insurance Company *v.* Prewitt, a Kentucky statute required foreign insurance companies to procure from the Commissioner of Corporations licenses renewable annually. To entitle them to such a license, they must file with the Commissioner express consent to accept service on any agent within the state; and if at any time a foreign corporation removed a case to the federal courts, it became the duty of the Commissioner forthwith to revoke the license. It seems that the Insurance Company's permit had last been renewed on July 1, 1904. The following September the corporation filed a petition of removal; and on the 29th of that month, its license was duly revoked. The company secured an injunction in the lower state court, but this was reversed in the Kentucky Court of Appeals. The case went to the Supreme Court, which rendered a decision on February 19, 1906.[3] It dismissed the writ of error, on the ground that the license granted July 1, 1904, and whose revocation was complained of, had expired of its own force on July 1, 1905, so that the lawfulness of the revocation was a moot question. " The refusal on the part of the Insurance Commissioner," the court said, " to grant authority to plaintiff to transact business after the old per-

[1] Southern Pacific Company *v.* Denton, 146 U. S. 202, 207 (1892); Martin *v.* Baltimore and Ohio Railroad, 151 U. S. 673, 684 (1894); Barrow Steamship Company *v.* Kane, 170 U. S. 100, 111 (1898).

[2] Bigelow *v.* Nickerson, 70 Fed. 113 (1895); Chattanooga Railroad Company *v.* Evans, 66 Fed. 809, 814 (1895).

[3] Security Mutual Insurance Company *v.* Prewitt, 200 U. S. 446 (1906).

mit had expired does not raise a federal question." The decision was unanimous. Yet it seems flatly to overrule Barron *v.* Burnside, which was decided on the ground that "as the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, *the statute requiring the permit must be held to be void.*" In other words the corporation may come into the state without a permit, and an attempt to exclude it by penalizing persons who act on its behalf *does* raise a federal question.

However this may be, a petition for rehearing was filed, bringing to the attention of the court the added fact that the Commissioner of Insurance had on July 1, 1905, granted a renewal of the permit, apparently for the purpose of testing the constitutionality of the Act, and that he now threatened to revoke the new permit. On this showing, and without requiring further argument, the court consented to consider the case on its merits, and on May 14, 1906, rendered a decision sustaining the state's right to revoke the license and expel the corporation.[1] Justices Day and Harlan vigorously dissented. Barron *v.* Burnside was by the majority distinguished on the ground that there the penalty was for refusing to *agree* not to remove to the federal courts, not for actually removing. The distinction is an astonishing one. The indictment in Barron *v.* Burnside was not for failure to file the agreement. The agent who was indicted was under no statutory duty to file it. The indictment was for doing business on behalf of a corporation which had failed to comply with a condition imposed by the state. If the distinction, then, is to have any meaning, it must go to the extent of preventing a state from expelling a corporation for failing to file such a stipulation. For if the decree of expulsion were valid surely it could be made effective by criminal prosecution

[1] 202 U. S. 246.

against an agent who helped the corporation to violate it. A federal district court has so interpreted the distinction, and has enjoined state officials from revoking the license of a foreign corporation which failed to stipulate that it would not resort to the federal courts.[1] The result is then that a state cannot compel a foreign corporation to file an entirely harmless and nugatory stipulation, a stipulation which is impotent to oust the federal courts of jurisdiction, but it may with impunity expel a corporation which actually invokes their jurisdiction. Is not this straining at a gnat and swallowing a camel? It seems impossible that both Barron *v.* Burnside and the Prewitt case should stand.[2]

Recent decisions indicate that it is the Prewitt case which must yield, and that the court is once more returning to the doctrine of Barron *v.* Burnside. In Ludwig *v.* Western Union Telegraph Company,[3] the court enjoined the revocation of the corporation's license to do local business because it had

[1] Western Union Telegraph Company *v.* Frear, 216 Fed. 199 (1914). Affirmed on a different principle, 241 U. S. 329 (1916).

[2] A writer in the *Michigan Law Review* (Harold W. Bowman, The State's Power over Foreign Corporations, 9 Mich. L. Rev. 549), analyzes these cases as drawing a distinction between conditions precedent and conditions subsequent — the former being invalid, the latter valid. This way of putting the matter has the merit of verbal simplicity, but it hides the real difficulty, and suggests a reconciliation where none is possible. It is true that in Barron *v.* Burnside the condition happened to be precedent, i. e., one that the corporation was supposed to perform before it came into the state. But the result would not have been different if the law had been passed after it came in, and had required the filing of the stipulation on pain of expulsion. Mr. Bowman's terminology would be applicable to a legal system which prevented a state from posting guards at its boundaries with orders to keep foreign corporations out unless they complied with certain conditions, but permitted it forthwith to expel the corporation for failure to comply with those conditions. But such an absurdity has not been achieved. The court's distinction turns on the character of the thing required of the foreign corporation, rather than on whether the corporation's performance is a condition precedent to its admission, or nonperformance a condition terminating its presence in the state. If the thing required is a contract not to resort to the federal courts, both a refusal to admit and an expulsion for breach of that requirement may be enjoined; if the thing required is actual abstention from the federal courts, an expulsion for breach is lawful.

[3] 216 U. S. 146 (1910).

violated one of these statutes, but the decision was grounded on the doctrine of the Pullman and the Telegraph cases,[1] that an unreasonable burden on the local business of a corporation carrying on interstate commerce would violate the Commerce Clause. In Herndon *v.* Chicago, Rock Island and Pacific Railway,[2] a similar injunction was upheld, but it was justified on the ground that the corporation had become a " person within the jurisdiction " entitled, in that respect at least, to equal treatment with domestic corporations.[3] In Harrison *v.* St. Louis and San Francisco Railroad Company,[4] expulsion under such a statute was again enjoined. The argument of Chief Justice White speaking for a unanimous court, goes entirely on grounds equally applicable to intrastate and interstate corporations. "The right," he said, "unrestrained and unpenalized by state action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a state to a United States court is obviously of the very essence of the right to remove conferred by the law of the United States." Toward the end of the opinion, however, the court refers to the Prewitt and Doyle cases, and distinguishes them on the ground that they did not involve interstate commerce. The court also cited the Herndon case, and said that " the grounds of decision " in that case " show the extremely narrow scope of the rulings in the Doyle and Prewitt cases." Finally in Donald *v.* Philadelphia and Reading Coal Company,[5] the facts indicate that the corporation was both engaged in interstate commerce, and a " person within the jurisdiction "; but in enjoining expulsion because the corporation had removed a case to the federal courts, the Supreme Court at no time referred to these facts, but based its decision on arguments applicable to all foreign corporations.

[1] *Supra*, 127, 128.
[2] 218 U. S. 135 (1910).
[3] As to this doctrine, see the next chapter.
[4] 232 U. S. 318 (1914).
[5] 241 U. S. 329 (1916).

The Prewitt case, then, has not been expressly overruled; but there is very little doubt that it is no longer law.

Despite the ambiguous language in which this doctrine of "unconstitutional conditions" has been expressed, the principle upon which it rests, as applied to these removal cases, is tolerably plain. It seems to have been more clearly appreciated, by its friends as well as by its opponents, in the case of Insurance Company *v.* Doyle than in the later decisions.

"The argument," said Mr. Justice Hunt, for the majority, "that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the state is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law."

To a lawyer today the argument has a familiar ring. It is precisely that of the Law Lords who constituted the majority in the famous case of Allen *v.* Flood.[1] A man has an absolute right to stop dealing with his employer at will, they reasoned. Therefore he can qualify the exercise of his right to leave by agreeing to stay on condition. That this condition happens to be, or even was intended to be, injurious to a third person is immaterial, for the court cannot inquire into the intention with which a lawful act was done. And the dissenting Justices in the Doyle case answered Justice Hunt's objection in precisely the way that the doctrine of Allen *v.* Flood has since been answered and refuted:[2]

[1] [1898] A. C. 1.

[2] See Professor Ames, 18 Harv. L. Rev. 412; Jeremiah Smith, 20 Harv. L. Rev. 253.

The argument used, that the greater always includes the less, and, therefore, if the state may exclude the appellees without any cause, it may exclude them for a *bad* cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property.[1]

In other words, the law visiting expulsion on any corporation which petitions for removal is a coercive boycott aimed against the jurisdiction of the United States courts. And it is the proclaimed motive which makes the expulsion objectionable. Is such a boycott constitutional? Is there not an implied limitation, in the Constitution, that states shall not exercise granted powers in such a way as to preclude individuals from asserting privileges on whose assertion the framers of the Constitution relied to secure the proper functioning of the organs of the federal government? There are other implied limitations of like character. The federal government is given power to establish a bank; by implication states are forbidden to hamper the exercise of that power even by as mild an interference as a tax.[2] The federal government is given power to regulate commerce; by implication states may not affect such commerce with directly burdensome regulations[3] and if those regulations are motivated by a desire to discriminate against interstate commerce, a prohibition is implied even though the burden be only trifling.[4] Is it not an implication reasonably deducible from the purposes of the Constitution that when the federal courts were vested with jurisdiction over suits by citizens of one state against citizens of another, it was intended that no state should by fear or favor induce any citizen to impair that

[1] 94 U. S. 535, 543. The italics are mine.
[2] McCulloch *v.* Maryland, 4 Wheat. 316 (1819).
[3] Wabash Railway Company *v.* Illinois, 118 U. S. 557 (1886).
[4] Welton *v.* Missouri, 91 U. S. 275 (1875).

jurisdiction? If no such prohibition was intended, there is hardly a limit beyond which states might not go. If a corporation can be expelled because it sues in the federal courts, it can be expelled because it appeals a case from the state courts to the United States Supreme Court. Or if it should be sued in the federal courts, it could be expelled because it asserted a defense valid in that court, but not recognized in the state courts. If a foreign nation were to expel an American firm because it appealed to our state department for diplomatic protection, we would consider it a serious infringement of international rights, regardless of the original merits of the dispute. That a member of the American Union could with impunity take such action toward the federal government, is certainly contrary to the principles of the Constitution.

If the doctrine of unconstitutional conditions had been confined to this class of cases, it need not have seriously impaired the accepted view that a state could expel a foreign corporation at will. But it soon became evident that it was to have a wider application. Its full scope was first suggested by Mr. Justice Day, in his dissent in the Prewitt case. Since that dissent soon came to represent the views of the majority, his remarks are worth careful notice:

> If a state may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude, includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation — You may do

business within this state provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions.

It was in the revolutionary series of cases decided in 1910, two of which have already been described,[1] that the views of Mr. Justice Day were adopted by the majority of the Supreme Court. It was there argued, it will be recalled, that even though a state had full control over the privilege of doing intrastate business within its borders, it could not qualify its permission with the condition that the corporation surrender its constitutional exemption from taxation on its interstate business. This aspect of the problem has already been sufficiently discussed. In these cases, however, was suggested another application of the doctrine of even more far reaching importance, affecting corporations entirely outside the protection of the Commerce Clause. A state, as is well known, cannot tax a corporation on account of realty or tangible personalty permanently located outside the state.[2] Can it require of a foreign corporation, as a condition of continued permission to do business, the payment of a tax calculated according to its total capital stock, representing property without as well as within the state? The Supreme Court had several times decided that it could.[3] "There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. Nor can there be any greater objec-

[1] *Supra*, 127, 128.

[2] Union Transit Company *v.* Kentucky, 199 U. S. 194 (1905).

[3] Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181 (1888); Horn Silver Mining Company *v.* New York, 143 U. S. 305 (1892).

tion to a similar tax upon a foreign corporation doing business by its permission within the state." [1] Yet in the Telegraph case,[2] it was definitely declared that a state could not, in return for a permit to a foreign corporation to do local business, compel payment of a tax on property outside the jurisdiction. In the Pullman case,[3] this was explicitly made one of the grounds of decision. Again in Ludwig *v.* Western Union Telegraph Company,[4] a condition was declared " unconstitutional and void, as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the state." These were all corporations engaged also in interstate commerce, although that fact was in no way relied on by the court, and is on principle irrelevant. In New York Life Insurance Company *v.* Head,[5] however, the court indicated its willingness to apply the doctrine to noncommercial corporations. A New York insurance company had established a branch office in Missouri, and there issued a policy to a resident of New Mexico, who was temporarily at St. Louis. He returned to New Mexico, and appointed the plaintiff beneficiary under the policy. She borrowed money from the company, on the strength of the policy, the loan being effected by mail, from the New York office. The insured defaulted in his premiums, and in accordance with the terms of the loan, the company cancelled the policy, deducted the loan, and unpaid premiums from the accumulated surplus, and devoted the remainder to the purchase of new paid-up insurance. This new (smaller) policy was sent to the plaintiff. A Missouri law, however, if applicable, required the company to devote the surplus to temporary insurance for the original amount, for as long a period

[1] Horn Silver Mining Company *v.* New York, 143 U. S. 305, 313.
[2] Western Union Telegraph Company *v.* Kansas, 216 U. S. 1, 38.
[3] Pullman Company *v.* Kansas, 216 U. S. 56, 62 (1910).
[4] Ludwig *v.* Western Union Telegraph Company, 216 U. S. 146, 163 (1910).
[5] 234 U. S. 149 (1914).

as the size of the surplus permitted. The insured died shortly after, and the plaintiff sued in Missouri to recover the full amount of the original insurance, claiming that the Missouri law controlled, and that if it had been obeyed, the temporary insurance would have outlasted the insured's life. She recovered in the state court, but the Supreme Court reversed the decision, on the ground that New York law alone governed the terms of the loan, and that the attempt on the part of Missouri to legislate as to a transaction beyond its jurisdiction was lacking in due process. To the argument that Missouri had imposed on the corporation, as a condition of admission in the state, a surrender of its charter power to make loans except as prescribed in the statute, Chief Justice White, for a unanimous court, replied:

> It is true it has been held that in view of the power of a state over insurance, it might, as the condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise but for the complete power to exclude would be held repugnant to the Constitution. . . . But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled or at all events so restricted as to deprive it of all application to this case (see Harrison *v.* St. Louis and San Francisco Railroad Company, 232 U. S. 318, 332, and authorities there cited) [1] it here can have no possible application since such doctrine at best but recognized the power of a state under the circumstances stated to impose conditions upon the right to do the business embraced by the license and therefore gives no support to the contention here presented which is that a state by a license may acquire the right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution.

In Equitable Life Society *v.* Pennsylvania,[2] the question arose in the case of a state tax on a foreign insurance company, measured by two per cent of the gross premiums on business within the state. The tax was sustained, as a fairly

[1] See *supra*, 139.

[2] 238 U. S. 143 (1915).

measured franchise tax, but the opinion of the court, by Mr. Justice Holmes, cites the Telegraph and Pullman cases for the proposition that " a state cannot tax property beyond its jurisdiction," and " cannot effect that result indirectly by making the payment a condition of the right to do local business," and assumes that it would be applicable in this case.

It may be confidently asserted, then, that the doctrine of unconstitutional conditions applies to all foreign corporations having tangible property permanently located beyond the confines of the state, whatever their character or business.[1]

These decisions have a most important bearing on the problem of the jurisdiction of the courts over foreign corporations.[2] If, as we have seen, a state cannot constitutionally extend a " statutory " or " implied " consent to service on a state officer, as to causes of action arising without the state, or to service in a manner inconsistent with due process, can it qualify its permission to do business by requiring an express consent ? Is not this an " unconstitutional condition," both void in its operation, and unenforceable by expulsion ? A recent dictum of the Supreme Court seems clearly applicable: " A state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law." [3] If it is applicable, a corporation, once it has come into the state, can refuse to give that consent, or repudiate it if it has been illegally required; and the state can neither indict it for failure to make the stipulation, nor expel it from the state.

[1] It has been so interpreted by the Supreme Court of California. H. K. Mulford Company *v.* Curry, 163 Cal. 276, 125 Pac. 236 (1912); and the Supreme Court of Oregon. Hirschfeld *v.* McCullagh, 64 Or. 502, 130 Pac. 1131 (1913). *Contra*, State *v.* Alderson, 49 Mont. 29, 140 Pac. 82 (1914).

[2] *Supra*, Ch. V.

[3] Baltic Mining Company *v.* Massachusetts, 231 U. S. 68, 83 (1913).

It may be urged that there is nothing improper in freely giving consent to be served in an unusual manner, or on a foreign cause of action; that it is only service without consent that violates due process; and that hence a condition that the corporation give consent is not a condition that it surrender its right to due process. But neither is a tax on foreign property imposed without due process, if the payment is voluntarily agreed to as part of a bargain. An agreement with a private individual for value received, to pay an annual percentage on all one's property, even on that employed in interstate commerce, would be unobjectionable. As long as it is voluntarily entered into, can it become unconstitutional because the promisee is the state, and its claim is called a tax? In this respect these cases are totally different from those involving the right of removal to the federal courts, for a contract to oust a court of jurisdiction is against public policy and void, whereas an agreement to pay a sum of money or to receive service through an agent is valid and enforceable.

When the argument has reached this stage, it becomes apparent that what the Supreme Court has really done is to abandon the traditional doctrine that a foreign corporation can be excluded at the will of the state. Until this is recognized, we are left in a maze of inconsistencies. To "permit your property to be taken without due process" is a contradiction in terms. Property taken by permission is not taken without due process. It must then be that the state cannot exact the permission. But when a state is no longer allowed to get what price it can for the privilege of doing business within its borders, this means that the privilege is no longer within its control.

CHAPTER IX

FOREIGN CORPORATIONS AND THE FOURTEENTH AMENDMENT

No sooner had the theory of " unconstitutional conditions " received the sanction of a majority of the Supreme Court, than another source of protection for foreign corporations made its appearance, based on a principle even more revolutionary. This was the doctrine that a corporation, being a " person," might under certain circumstances be protected by the Fourteenth Amendment against arbitrary expulsion from a state; and that, furthermore, it could become a " person within the jurisdiction," within the meaning of the second clause of the Amendment, and be entitled to some degree of equality of treatment with domestic corporations.

That a corporation is a person, under the Fourteenth Amendment, is of course well settled.[1] A foreign corporation cannot, therefore, be deprived of property arbitrarily.[2] It cannot be allowed to purchase property and then be denied the privilege of protecting its property by bringing or defending suit.[3] If it is expelled, seemingly, it must be given a reasonable opportunity to dispose of its property, or to carry it away, if movable.[4] But until 1910 no court had ventured to hold that this principle went beyond requiring a reasonable method of expulsion. The question had been carefully considered as late as 1906, in a case in which the distinction between an exercise of the power of expulsion, and a taking of

[1] Santa Clara County *v.* Southern Pacific Railroad Company, 118 U. S. 394, 396 (1886); Smyth *v.* Ames, 169 U. S. 466, 522 (1898).

[2] Chicago and N. W. Railway Company *v.* Dey, 35 Fed. 866 (1888); McFarland *v.* American Sugar Refining Company, 241 U. S. 79 (1916).

[3] Black *v.* Caldwell, 83 Fed. 880 (1897).

[4] See Mutual Life Insurance Company *v.* Spratley, 172 U. S. 602, 621 (1899).

property, was clearly set forth.[1] A national fraternal and religious society, incorporated in Pennsylvania, had suffered a schism, and the dissenting members had obtained from the Virginia legislature a charter conferring on them virtually the same name as the parent body, and granting them exclusive power to charter subordinate branches by that name within the state. A decree protecting these charter rights was brought before the Supreme Court on writ of error. In sustaining the decree, the court, through Mr. Justice Holmes, observed:

> If the legislation of a state undertook to appropriate to the use of its own creature a trade name of known commercial value, of course the argument would be very strong that an act of incorporation could not interfere with existing property rights. And no doubt within proper limits the argument would be as good for a foreign corporation as for a foreign person.

But the present case involved not a property right, but merely the right to carry on its functions within the state.

> The State of Virginia had the undoubted right to exclude the Pennsylvania corporation and to forbid its constituting branches within the Virginia boundaries. As it had that right before the corporation got in, so it had the right to turn it out after it got in.

That a foreign corporation was entitled to the equal protection of the laws, had also been assumed.[2] But it seemed entirely clear, in the words of Mr. Justice Field, that " the equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state." [3] Foreign and domestic corporations need not be on an equality.[4] Discriminating burdens

[1] National Council U. A. M. *v.* State Council, 203 U. S. 151 (1906).

[2] Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181, 188 (1887); Philadelphia Fire Association *v.* New York, 119 U. S. 110 (1886). Cf. Blake *v.* McClung, 172 U. S. 239, 260 (1898). See Beale, Foreign Corporations, § 126.

[3] Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181, 189.

[4] Ducat *v.* Chicago, 10 Wall. 410 (1870). And see the cases in note (1) *supra*.

could be placed on the corporation before its admission, and new burdens could be imposed thereafter.[1] Moreover the assumption of Mr. Justice Field, that the clause in the Fourteenth Amendment had any application to foreign corporations, was not entirely clear. He seems to have understood that " person within the jurisdiction " meant " person owning property within the jurisdiction."[2] The corporation itself was expressly said to be not within the jurisdiction. But in Blake *v.* McClung,[3] it was established that the corporation itself must be within the jurisdiction to come within the scope of the clause, and it was left in doubt whether a foreign corporation could fulfill this requirement. Certainly under the time-honored doctrine that a corporation " cannot migrate from its sovereignty," repeated and endorsed as late as

[1] Mutual Life Insurance Company *v.* Spratley, 172 U. S. 602 (1899); Philadelphia Fire Association *v.* New York, *supra.*

It is stated in Beale, Foreign Corporations, § 126 (published in 1905), that " the requirement of ' equal protection of the laws ' entitles a foreign corporation, after it has been admitted to the state, and while abiding by its conditions, to as favorable treatment under the laws as is granted to a domestic corporation." This seems to have been apocryphal, for the cases cited do not sustain the proposition. Justice Field's meaning in Pembina Mining Company *v.* Pennsylvania, *supra*, was only that there can be no discrimination between foreign corporations. Mutual Life Insurance Company *v.* Spratley, 172 U. S. 602, is flatly contrary to the text. There an insurance company was established in the state under one set of conditions. A new set of conditions, applicable only to foreign corporations, was sustained by the court. See especially 621.

Two state cases are cited as supporting the text: Caldwell *v.* Armour, 1 Penn. (Del.) 545, 43 Atl. 517 (1899); State *v.* Cadigan, 73 Vt. 245, 50 Atl. 1079 (1901). The Delaware case is cited for the proposition that a statute providing for one mode of service for residents and another for nonresidents is unconstitutional as applied to foreign corporations. But this was a case of individuals, acting as a partnership, who are concededly "citizens," and the rule as to foreign corporations is expressly stated to be otherwise. The Vermont case is cited to establish that a statute requiring different formalities to be observed by agents of a foreign corporation than by those of a domestic one, is invalid. But this also, was a case of a foreign partnership. Assuming, on the state of the pleadings, that the partners were citizens of Vermont, the court held that the mere fact of organization under a foreign law was not a relevant ground of classification. It was clearly the individuals, not the foreign partnership, that were considered " persons within the jurisdiction."

[2] Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181, 188.

[3] 172 U. S. 239, 260 (1898).

1900 by the Supreme Court,[1] it could hardly be within the jurisdiction even where it was doing business within the state.

All this was swept away in the series of cases, already frequently referred to, decided by the Supreme Court in 1910. In Western Union Telegraph Company *v.* Kansas,[2] Mr. Justice White based his concurrence with the majority on the ground that where a corporation had acquired property within the state, of a permanent character, not adaptable to other kinds of business, and hence not disposable except at a great sacrifice, an arbitrary expulsion would deprive it of property without due process. It is apparent that this was a radical departure. It cannot be considered a mere extension of the doctrine that in ousting a foreign corporation, the state must give it an opportunity to dispose of its property. If the state had in fact an absolute power of expulsion, the acquisition of permanent property in the state could not defeat it. "Whatever the corporation may do or acquire there is affected by the original weakness of dependence upon the will of the state."[3] Moreover in his concurring opinion in the Pullman case,[4] Justice White expressed his willingness to extend the doctrine to the case of a corporation owning only Pullman cars. These are only chattels, and could have been removed from the state without further sacrifice than the loss of income from the intrastate business. The doctrine is a clear repudiation, within the limits to which it applies, of the rule of Paul *v.* Virginia.

That a foreign corporation could become a person within the jurisdiction entitled to the equal protection of the laws, was established in the same year, in Southern Railroad Com-

[1] Waters-Pierce Oil Company *v.* Texas, 177 U. S. 28, 45 (1900).

[2] 216 U. S. 1 (1910).

[3] Mr. Justice Holmes, dissenting, in Western Union Telegraph Company *v.* Kansas, *supra*, 55.

[4] Pullman Company *v.* Kansas, 216 U. S. 56.

pany *v.* Greene.[1] There a foreign corporation had acquired permanent property within the state. A new franchise tax, described by the state court as " an additional privilege tax for the continued exercise of the corporate franchises within the state," was imposed, no similar tax being required of domestic corporations. The court held the tax invalid under the Fourteenth Amendment. Mr. Justice Day, who, it will be recalled, was one of the original proponents of the doctrine of unconstitutional conditions,[2] delivered the opinion of the majority. The following excerpt shows his reasoning clearly:

It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state and other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for doing within the state exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state, does violence to the Federal Constitution.

The four justices who formed the minority in the Telegraph and Pullman cases, dissented without opinion.[3]

[1] 216 U. S. 400 (1910). [2] *Supra*, 142.

[3] In the Corporation Tax Cases, 220 U. S. 107, 161 (1911), these decisions were urged to support a contention that the tax was void because it discriminated between corporate and natural persons; and in disposing of this contention, the Greene case was reviewed and approved:

" In that case," said the court, " the foreign corporation was doing business

Under what circumstances a corporation is a "person within the jurisdiction" within this rule, has not as yet been authoritatively adjudicated. The Massachusetts Supreme Court has sought to restrict the doctrine to quasi-public corporations, owning large amounts of property of a permanent and immovable character, inadaptable to other purposes,[1] and its opinion has been followed by the Supreme Court of Tennessee.[2] Undoubtedly there is language in the opinion of Mr. Justice Day in the Greene case supporting this view.[3] Yet a distinction based on the amount and character of the property owned by a corporation is hardly relevant to the question of its presence within the state. Between the case of a small business corporation which has established a branch store within the state, and a railroad with millions invested in permanent roadbed, there is a difference only in degree. To base a distinction on this difference would be to introduce an entirely new principle into our public law, that the wealth and magnitude of a corporation determines the degree of protection to which it is constitutionally entitled. The argument that railroad and telegraph property, being specially adapted to one kind of business only, cannot be readily sold, so that in these cases the hardship of expulsion

under the sanction of the state laws, not less than the local corporation; it had acquired its property under sanction of those laws; it had paid all direct and indirect taxes levied against it, and there was no practical distinction between it and a state corporation doing the same business in the same way.

[1] Baltic Mining Company *v.* Commonwealth, 207 Mass. 381 (1911). In affirming the decision, 231 U. S. 68, the Supreme Court did not pass on this question.

[2] Atlas Powder Company *v.* Goodloe, 131 Tenn. 490, 175 S. W. 547 (1914).

[3] Mr. Justice Day, at page 414, quotes with approval the following from an opinion of Brewer, J., then Circuit Judge, in Ames *v.* Union Pacific Railroad Company, 64 Fed. 165, 177 (1894):

"It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

or discrimination is exceptionally severe, is of little value. It is based on the assumption that if a state orders a railroad incorporated in another state to cease doing business, the railroad must forthwith sell its tracks and stations as junk, and break up its right of way into farm lots. In fact, the procedure would probably be for it to sell the property at its true value to a domestic corporation, which would continue to operate it as a railroad. But even if the fact which this argument assumes were true, it could hardly be made a ground of constitutional distinction. Whether a corporation, as a person, is exposed to arbitrary deprivation of property by expulsion, cannot depend on whether it is threatened with a loss of a thousand dollars or a million, or whether the property which is jeopardized consists of railroad tracks, branch stores, or goodwill. In each case it is property, and the corporation has been deprived of it. Nor has the character or amount of property which it owns the remotest bearing on the problem of the presence of the corporation within the jurisdiction. It seems to be a case where the court must either recede from its position that a foreign corporation *may* be protected from arbitrary expulsion or discrimination by the Fourteenth Amendment, or else go forward and apply that principle wherever the corporation is doing business in the state to such an extent that it would be considered " present " or " found " there, for purposes of jurisdiction.[1] Any other outcome would be a virtual confession that the court had allowed hard cases to make bad law.

In several recent decisions the Supreme Court seems purposely to have left this question open. In Phoenix Insurance Company *v.* McMaster [2] the question arose with respect to a foreign insurance company.

" Assuming, without deciding," the court said, " that the Phoenix Company occupied such attitude in the State of

[1] *Supra*, 87 ff. [2] 237 U. S. 63 (1915).

South Carolina as to entitle it to claim the benefit of the equal protection clause of the Fourteenth Amendment," it was clear that the particular statute objected to was not discriminatory. In Interstate Amusement Company *v.* Albert,[1] a foreign corporation engaged in placing vaudeville shows brought a writ of error because a state court had dismissed its suit on the ground that it had failed to comply with the state statutes requiring it to file a list of its stockholders, appoint an agent to receive service of process, etc. The discussion of the court turned largely on whether the corporation was doing business within the state. Counsel's argument under the Fourteenth Amendment was thus curtly dismissed: " The insistence based upon the ' equal protection ' clause is unsubstantial, and calls for no discussion." Whether this means that the corporation, though doing business in the state, is not entitled to the equal protection of the laws; or that in this case the legislation was not discriminatory, is left in doubt. As the legislation appears to have been fair, and designed merely to place foreign corporations on an equality with domestic ones, the case is certainly not an authority against the applicability of the Fourteenth Amendment.

As to the degree of equality to which corporations entitled to this protection are to be treated, there is even more uncertainty. In Herndon *v.* Chicago, Rock Island and Pacific Railway,[2] the doctrine was applied to sustain an injunction against an attempt by the state officials to expel a foreign corporation because it resorted to the federal courts. A domestic corporation, it was pointed out, might exercise this right; therefore it could not be denied a foreign corporation. Perhaps the case may be taken to stand for the general principle that with respect to suits in the state courts, substantial discriminations based on the state of incorporation are not permissible. As to corporations engaged in interstate com-

[1] 239 U. S. 560 (1916). [2] 218 U. S. 135 (1910).

merce, as has been said, this result has already been achieved.[1] In Phoenix Insurance Company *v.* McMaster,[2] the corporation objected to a statute authorizing the insurance commissioner to require the deposit of approved securities from insurance companies, a larger amount being required of foreign than of domestic corporations. The classification was sustained, as bearing a reasonable relevancy to the legislative problem of providing security for policyholders, since domestic corporations were more likely to have property liable to attachment within the state. It is interesting to note that the facts were essentially the same as in the famous case of Paul *v.* Virginia.[3] Yet that case was not cited by the court; it relied entirely on the nondiscriminatory character of the statute. The case is a striking demonstration of the abandonment of the traditional doctrine.

The uncertainty as to the scope of the new doctrines is perhaps greatest in the field in which they were first evolved, that of taxation. The doctrine of the Telegraph and Pullman cases,[4] that a state cannot in the guise of a license fee, tax a foreign corporation with respect to interstate business, or property beyond the jurisdiction, is of course applicable, *a fortiori*, to domestic corporations.[5] This fact greatly facilitates the application of a rule of equality. With respect to both classes of corporations, the line which the Supreme Court draws between legitimate license taxes, and covert attempts to reach interstate commerce or foreign property, is an exceedingly fine one as has been noted.[6] In the Telegraph and Pullman cases, the tax was absolutely proportionate to the capital stock, and amounted to $20,100 and $14,800 respectively. In Baltic Mining Company *v.* Massachusetts,[7] the tax was only roughly graded according to the authorized

[1] *Supra*, 139 ff.
[2] 237 U. S. 63 (1915).
[3] 8 Wall. 168 (1868).
[4] *Supra*, 128 ff.
[5] See H. K. Mulford Company *v.* Curry, 163 Cal. 276, 125 Pac. 236 (1912).
[6] *Supra*, 121 ff.
[7] 231 U. S. 68 (1913).

capital stock, and the total tax was limited to $2000, regardless of the corporation's size. This was held a valid tax, three of the Justices dissenting. Kansas City Railway *v.* Botkin,[1] involved a new Kansas statute much like the Massachusetts one; the highest tax that could be levied being $2500. This also was sustained, the contestant being a domestic corporation. But the statute also provided that foreign corporations doing business in the state should pay a franchise tax estimated in the same way, but only on such capital stock "as is devoted to its Kansas business." In Lusk *v.* Kansas,[2] decided at the same time as the Kansas City Railway case, this part of the statute was sustained; indeed the only argument against its validity had been that since the domestic tax was invalid, the tax on foreign corporations must under the equal protection clause fall with it. The result, however, is a discrimination, in certain instances, against domestic corporations. A domestic corporation owning property both within and without the state must pay a tax estimated on all its capital stock, while a foreign corporation, owning precisely the same property, and doing the same business, would have to pay a tax only on the part of its stock devoted to local business. This seems to be contrary to the principle of the Greene case, which logically should condemn discriminations in favor of foreign corporations as well as in favor of domestic ones. Probably the point could not have been raised in these cases. The tax was so graduated that the largest amount, $2500, was payable by all corporations of over $5,000,000 capitalization. The Kansas City Railway was capitalized at $31,660,000. Undoubtedly the amount of this capitalization representing domestic business was well above the taxable maximum. The railroad was not, therefore, in a position to complain that the tax on domestic corporations was not restricted to a percentage of the stock representing domestic

[1] 240 U. S. 227 (1916). [2] 240 U. S. 236 (1916).

business. A corporation capitalized at say $5,000,000, with part of its business carried on in another state, would, it seems, be entitled to raise this question.

The argument is not applicable, however, to Kansas City, Memphis and Birmingham Railroad Company *v.* Stiles,[1] decided in October Term, 1916. The railroad company, in this case, was a consolidated corporation incorporated in three states, Tennessee, Mississippi, and Alabama. The Alabama law authorizing the consolidation provided that any corporation which was formed under its terms shall be "in all respects subject to the laws of the State of Alabama as a domestic corporation." The Alabama tax laws imposed on all domestic corporations a tax graded according to the capital stock, although at a diminishing rate per thousand as the capital stock increased.[2] Foreign corporations were taxed on the same percentages, but only on capital stock representing business within the state. The railroad was taxed as a domestic corporation, and assessed a tax measured by its whole capital stock, more than half of which represented business in other states. This tax was sustained. The court declared that the privilege of consolidation was completely under the control of the state; and that the corporations "cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the State of Alabama." The court distinguished the Greene case as follows, Mr. Justice Day, the author of the opinion in the Greene case, speaking again for the court:

> In that case, a foreign corporation, complying with the laws of Alabama, entered upon business within the state, paid both license and property taxes imposed by the laws of the state, and when it was

[1] 242 U. S. 111 (1916).

[2] Capital stock up to $50,000 was taxed at $1.00 per thousand; from thence to $1,000,000 at 50 cents per thousand, thence to $5,000,000 at 25 cents, and all additional at 10 cents per thousand. The total tax for the plaintiff in error was $2,434.40.

attempted to impose upon it another tax for the privilege of doing business in the state, a business in all respects like that done by domestic corporations of a similar character who were not subjected to the additional tax complained of, it contended that it was denied equal protection of the law, and this court so held.

That case is readily distinguishable from the one now under consideration. Here the state imposes the franchise tax equally upon all of its corporations, consolidated and otherwise. The fact that a wholly intrastate corporation may own no property outside of the state, while the consolidated company does, presents no case of arbitrary classification. In both cases, the franchise tax is based upon a percentage of the capital stock. There is no denial of equal protection of the laws because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.

The distinction is a very troublesome one. It seems to reduce itself to the circumstance that in the Greene case the tax of the foreign corporation was *increased* without a corresponding increase in the tax of domestic corporations; while in the Stiles case, the tax of the foreign corporation was *reduced* without a corresponding reduction of the tax on domestic corporations. If the foreign corporation can complain of the discriminating increase, it is not easy to conceive why a domestic corporation may not complain of the discriminating reduction. The case seems to establish that the requirement of equality works only in favor of the foreign corporation.

One further point, of great importance, the cases have left in doubt. If a statute places discriminating burdens on foreign corporations, and a corporation enters the state after the statute is enacted, can it then complain that it is denied the equal protection of the laws, or deprived of property without due process? Is there enough of the doctrine of Paul *v.* Virginia left to make the entrance into the state an expression of consent to the discrimination, so that on the maxim of

volenti non fit injuria the corporation cannot complain, but is subject, as an ingenious writer has put it,[1] to a permanent constitutional disability "running with the corporation?" There is undoubtedly much in the cautious language of the Supreme Court giving sanction to this view. Mr. Justice White, concurring in the Telegraph case, made this distinction. To the argument that the decisions conclusively established the state's power to admit foreign corporations on discriminating conditions, he replied that it was inapplicable:

> Such is the case, since this cause is concerned, not with the power of the state to prevent a corporation from coming in for the purpose of doing local business and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state and which has been there for years, devoted to the doing of local business as the result of the implied invitation or tacit consent of the state arising from its failure to forbid or to regulate the coming in.

Mr. Justice Day, speaking for the majority in the Greene case, answered a similar argument in the same terms:

> It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that state; nor with one which has come into the state upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the State of Alabama, with the permission of the state and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the state.

The argument *de maximis* suggested in this extract I have already discussed.[2] The other argument, that a foreign corporation derives a peculiar status from long-continued enjoyment of the state's hospitality under nondiscriminatory

[1] Harold M. Bowman, *The State's Power over Foreign Corporations*, 9 Mich. L. Rev. 549.

[2] *Supra*, 151.

laws, is more formidable. If this view prevails, the doctrine of the state's power to exclude foreign corporations has still much vitality left. It will protect corporations which have unlimited licenses against additional exactions, but it will not prevent states from carrying out a policy of aggressive discrimination against corporations seeking admission. As to them, the state can not only impose discriminating conditions at the outset, but it can grant them licenses running for a year, and require an annual renewal. Each renewal can then be made conditional on whatever further exactions the state wishes to make. And if from year to year, why not for a shorter period, or even at will? The effect of the Greene case would then be similar to that of the famous Dartmouth College case [1] and could be as easily avoided by a general reservation of the right to amend. This points, it seems to me, to the fallacy underlying any such restriction of the doctrine of the Greene case, for a license terminable at will is precisely what the traditional doctrine has always called the corporation's tenure.[2] If a corporation can give an effective consent to the state's express statutory reservation of the right to alter the conditions on which it may remain, why could it not as effectively consent to what the Supreme Court had always said was the state's right without such reservation? To limit the doctrine of the Greene case to corporations already lawfully in the state by official license is to conclusively refute the reasoning on which that case rests.

Is it not just here that the doctrine of unconstitutional conditions applies? That doctrine, in its later form,[3] is that a state cannot, in the guise of a conditional license to do business in the state, exact of a foreign corporation anything which it could not exact by direct imposition. It cannot admit a corporation on condition that it will allow itself to be deprived of property without due process, or to be denied

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819).
[2] Mutual Life Insurance Company *v.* Spratley, 172 U. S. 602, 620.
[3] *Supra*, 140.

the equal protection of the laws. It cannot even expel a corporation because it has resisted such an exaction or discrimination. Then how can that condition, of itself illegal and unenforceable, serve as a ground for attributing to the corporation a consent to its terms? The two doctrines, the doctrine of the Greene case and the doctrine of unconstitutional conditions, supplement each other as completely as if they had been consciously fashioned for that purpose. Perhaps it would be more accurate to say that the two doctrines are identical, that they are merely two angles of approach to the same constitutional principle. As I have said, the doctrine of unconstitutional conditions, in so far as it applies, as it almost certainly does, to cases other than the removal cases, has of itself no constitutional basis to stand upon. A condition can properly be termed unconstitutional in the sense that the Constitution renders it invalid; but if we go further and say that a state cannot expel the corporation because it has violated the condition, it can only be because there is in the federal Constitution a prohibition against expulsion for such a reason. Since outside of the Fourteenth Amendment there is no such prohibition, it must be found in that Amendment. It follows that the enforcement by expulsion of an "unconstitutional condition" can be enjoined only on the ground that the corporation, as a person, is arbitrarily deprived of its property; or, as a person within the jurisdiction, is denied the equal protection of the laws.

It seems most likely, therefore, that the doctrine of unconstitutional conditions will in the future be absorbed in the larger principle that a foreign corporation is protected against arbitrary expulsion or discrimination by the Fourteenth Amendment, and that its only influence will be to insure that that doctrine is applied not only to corporations already in the state when the objectionable law was passed, but to all that may subsequently enter.

CHAPTER X

A CRITICAL RE-EXAMINATION

In the decision of practical controversies, bare logic has perhaps less influence even on its professed practitioners than jurists are willing to acknowledge. Few logical arguments are so compelling that they will not in time yield before a strong desire to attain some concrete result. In a psychological rather than a metaphysical sense, a legal system which claims inherent validity may often be merely the expression of a strong social desire, rooted in economic needs and ambitions, communicated through practical experience or intercourse to the mind of some jurist of statesmanlike quality and creative legal power, and by him formulated as a logical framework. In this sense, the system of foreign corporations constructed by Chief Justice Taney represented accurately the dominant desires of the time. A more pronounced hostility to corporate institutions might have led to the conception that an express mandate is necessary to allow the courts to "recognize" the personality of a foreign corporation. A more urgent social desire to promote the cosmopolitanism of business enterprise might have motivated the conception that a corporation is a "citizen" entitled to equal privileges and immunities with domestic corporations. Taney's system was a compromise between these two, and it truly reflected what was at that time the social resultant of the local jealousies and provincial interests of the more agrarian communities, and the budding nationalism of commerce and finance.

The industrial revolution through which America has passed since Taney's day, by which for many purposes the

nation rather than the state has become the economic unit, has immensely accentuated those social desires favorable to nationalism, and correspondingly weakened the force of local jealousies. Only the extreme juristic idealist would deny that this revolution has had some effect on the course of judicial decision. In the subsequent development of Taney's system, there may be traced something not unlike a phenomenon familiar to students of individual psychology. When an adherent of a systematic faith is brought continuously in touch with influences and exposed to desires inconsistent with that faith, a process of unconscious cerebration may take place, by which a growing store of hostile mental inclinations may accumulate, strongly motivating action and decision, but seldom emerging clearly into consciousness. In the meantime the formulas of the old faith are retained and repeated by force of habit, until one day the realization comes that conduct and sympathies and fundamental desires have become so inconsistent with this logical framework that it must be discarded. Then begins the task of building up and rationalizing a new faith.

Even today courts and lawyers discuss the law of foreign corporations in terms of Chief Justice Taney's system. The developments which I have traced have come rather in the form of exceptions, of presumptions of fact, of fictions, of illogical deductions from the assumed principles. The result is a theoretical system which is inharmonious and unsymmetrical. The proper function of a juristic theory is to make for certainty and foreseeability of judicial decision, for simplicity and harmony of legal technique. A legal theory approaches perfection according as it achieves these results and yet steers as close as may be to the dominant conceptions of policy and public interest. It can hardly be claimed that the traditional American theory of foreign corporations has fulfilled this function. It has not made for certainty; few

branches of the law affect such large interests, yet it would be difficult to find one in which the decisions of the Supreme Court have been so hard to forecast, and in which so many of the most fundamental questions are as yet unsettled. It has not made for justice; for as applied to modern industrial conditions, it runs contrary to the whole spirit of our constitutional system by permitting, at least in theory, discrimination, retaliation, and commercial warfare between the states.

A great deal of the trouble can be traced directly to a faulty conception of the nature of a corporation, to the philosophy which looks upon a corporation as a fiction of the law, and nothing more. For present purposes it is not necessary to review the historic controversy between those who believe that corporate personality is either a fiction or a concession of the state, and those who believe that it has a " real " existence.[1] Much of the controversy, it seems to me, springs out of an unnecessary assumption common to both belligerents. The syllogism of the " fiction " school may be stated as follows: Only persons can be subjects of rights and duties. A corporation is the subject of rights and duties. Therefore the law must set up the fiction that a corporation is a person. The " real " school states the major and minor premise in the same way; but its conclusion is that a corporation actually is a person. Now if we deny the validity of the major premise, both conclusions are rendered unnecessary, and the conflict between them becomes academic. And the major premise modern jurisprudence has very generally rejected. The assumption that a person alone can be the subject of rights is based on the conception of a right as a philosophic entity, springing out of the nature of man, independent of the law

[1] The European literature is summarized conveniently in Machen, *Corporate Personality*, 24 Harv. L. Rev. 253, 347. See also Pillet, *Personnes Morales en Droit International Privé*, 17–57; Laski, *The Personality of Associations*, 29 Harv. L. Rev. 404; Freund, *The Nature of Legal Personality*.

and anterior to it. As has been pointed out,[1] this use of the word really identifies " right " with " interest." But this is not the sense in which the word right is used when we speak of a corporation. When we speak of a corporation being the subject of rights, we mean that it has the capacity to enter into legal relations — to make contracts, own property, bring suits. Rights, in this sense, are pure creatures of the law. They are part of the technique by which the law expresses a result which it wishes to attain. Thus in admiralty, a ship is personified. It is the legal unit. The ultimate interests, the " rights " in the broad philosophic sense, are those of the owners, charterers, etc.; but in the narrow, technical sense the rights and duties are those of the personified ship. This is merely a matter of judicial technique, of expediency. In this sense anything can be made a legal unit, and the subject of rights and duties, a fund,[2] a building,[3] a child unborn,[4] a family.[5] There is no reason, except the practical one, why, as some one has suggested, the law should not accord to the last rose of summer a legal right not to be plucked.

When a number of persons have, in certain respects, pooled their interests, putting their property in a common fund, or contributing their labor toward a common undertaking, they constitute a group, and the interests of the individuals, in so far as they have been pooled, may for convenience be termed the interests of the group. These interests could, conceivably, be protected by the legal mechanism of individual rights, as in a common law partnership, or an unincorporated association. The group, again, will come into relations with outsiders, and their interests, or the interests of the public at

[1] Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 345.

[2] E. g., the German " Stiftung."

[3] A bank has recently been incorporated in Australia, without incorporators. See Journal of Society of Comparative Legislation, N.S. xvi, Pt. 1, 57.

[4] Lutterel's Case, Precedents in Chancery, 50.

[5] Maine, Ancient Law, 197.

large, may require protection. Here again, a complicated system of individual duties imposed on the members of the group might be devised to protect these interests. But to achieve the practical results desired, of unity of action, continuity of policy, limited liability on the part of the owners coupled with full liability of group assets, and yet retain the mechanism of individual rights and duties, would require a system so intricate that for practical juristic purposes it would be unworkable. To protect group interests as well as the interests of outsiders more adequately, and with less waste of legal effort, the corporate device has been contrived, by which the " rights " and " duties " of the members of the group with respect to a given transaction are replaced by a single set of rights and a single set of duties.

This corporate device is not an expression of any inherent philosophic quality in the group — of any group will, or group organism. It is no more than a convenient technical device. The interests which it is designed to protect are of course real, just as the individuals which compose the group are real. But to attribute to the corporate " personality " any sort of reality seems to me the most misleading anthropomorphism. A group bent on a common purpose may in a certain sense be said to have a group will. That is, the contagion of the crowd brings forth in each individual the same set of desires and emotions, and inhibits the ordinary individual diversities. But a group will, in this sense of the word, has no particular relation to legal personality. A mob on a lynching bee, or a team in a football contest, both extreme examples of group will overriding individual will, do not proceed to incorporate themselves before they set to work. A business firm is incorporated, and accorded legal personality, merely because that is, juristically, the most satisfactory way of achieving a desired result. The term " legal person " is therefore in its origin a fictitious, or more accurately a

metaphorical term. It was only because our habits of thought had accustomed us to consider persons as the only subjects of rights and duties that the corporation has been termed a legal person. Its legal personality is entirely a creature of the law. So indeed is all legal personality even of human beings.[1] If we wish to confine the term " corporation " to this purely legal creation, the legal personality, we cannot quarrel with Marshall's famous definition. It is, perhaps, unnecessary to call the legal entity a fiction — it is no more fictitious than any other legal concept, a right, a contract, a title — but it is certainly no more than a creature of the law.

The vice in Marshall's theory of corporation law lay rather in its tendency to overlook the fact that this invisible, law-created entity is devised for the purpose of protecting the interests of a very tangible and " real " group of men, with tangible common property and common interests.[2] It is this group that is generally the fact of primary importance; the legal entity is no more than a means to an end. It is this group that the word " corporation " generally brings to mind, to all but the cloistered theorist. To call *it* intangible and invisible is an absurdity. Kyd has put the matter with his customary vigor:[3]

> That a body framed by the policy of man, a body whose parts and members are mortal, should in its own nature be immortal, or that a body composed of many bulky, *visible* bodies should be *invisible*, in the common acceptation of the words, seems beyond the reach of common understandings. A corporation is as visible a body as an army; for though the commission or authority be not seen by everyone, yet the body, united by that authority, is seen by all but the blind.

[1] Slaves were not legal persons in Marshall's day. See 2 Kent, 278.

[2] Marshall himself, it should be added, was a man of practical sense, and was quite willing to abandon his theory and contemplate a corporation " more substantially " if the occasion seemed to call for it. See Bank of United States *v.* Deveaux, 5 Cranch, 61, 89.

[3] 1 Kyd, 15. The italics are mine.

The group includes, it should be added, not only the passive element, the stockholders, but also the active, productive element, the directors, officers, agents and employees from president to common laborer. They are all contributing something to the common undertaking, whether of property or labor. Whether their reward is drawn in the form of wages, salaries or dividends is a matter of internal arrangement, to be governed, in the corporate legal mechanism, by the rights and duties running between the individuals and the legal entity. As against outsiders, the legal entity exists to protect them all. The earlier conception that the " corporators " or stockholders, constitute the corporation, and that the other elements in the group are merely their agents, is of no value under modern conditions. The modern stockholder is a negligible factor in the management of a corporation.

When Taney said that a corporation " can have no legal existence out of the boundaries of the sovereignty by which it is created," he was obviously referring to the abstract legal entity, the creature of the law, and not to the tangible group. It is not easy to conceive how this legal abstraction can have geographical location. When we say that it is a " creature of the law," we mean that it exists only because lawyers and judges think about it. Any attempt to limit its existence within geographical borders can only mean that within those borders alone is it a part of the legal scheme of thought. But the doctrine of comity that Taney adopted expressly repudiates this meaning. The decision in Bank of Augusta *v.* Earle,[1] was that acts done on behalf of the bank in Alabama were productive of rights running to the legal entity. In what sense of the word the entity could be said to be absent from Alabama, when the thought of it is in the mind of a court administering Alabama law, and it guides them to a decision, is not easy to grasp.

[1] 13 Pet. 519 (1839).

The geographical theory is sometimes stated in the form of a distinction between two classes of corporate representatives, officers, and agents. We have already encountered this conception in one of the early American cases.[1] Professor Beale has stated the matter more clearly:

> Individuals may represent corporations in two ways; as ordinary agents, or as officers. The relation of an ordinary agent to a corporation is the same as that of an agent to an individual principal; and it is impossible to obtain personal service on a principal by service on his agent. Therefore service on an ordinary agent of a corporation is not personal service on the corporation. An officer bears a different relation to the corporation; he is legally a part of it, and service which reaches an officer in his official capacity reaches the corporation itself, and is personal service upon it. But an officer of a corporation cannot carry his official capacity outside the state of charter; he may represent the corporation abroad as agent, but not as officer. Consequently service of process on even an officer of a foreign corporation is not personal service on the corporation.[2]

The distinction has, it is submitted, no practical significance. If a man can be an officer only within the state of incorporation, the presidency would be legally vacant whenever its incumbent left the state! And if the corporate entity is to be identified with the legal quality of its officers, the corporation would be dissolved if they were all out of the state. An officer seldom changes his relations to the corporation by leaving the state of incorporation. As counsel once put it, he " did not *slip out* of his office on crossing the river, and then *slip back into it* by his return." [3] If the status of agent is recognized by another state, there is no reason why the status of officer should not be recognized. An officer is merely a species of the genus agent.

[1] Matter of M'Queen *v.* Middletown Manufacturing Company, 16 Johns. 5 (1819). See *supra*, 77.

[2] Foreign Corporations, 389. See also Newell *v.* Great Western Railway Company, 19 Mich. 336 (1869).

[3] Zabriskie, *arguendo*, in Moulin *v.* Trenton Mutual Life and Fire Insurance Company, 24 N. J. L. 222, 225.

However this may be, the matter can have no practical bearing on the actual problems of the law of foreign corporations. The problem of the jurisdiction of the courts over foreign corporations, the field in which Taney's geographical theory bore its first fruits, clearly has nothing to do with it. The notions of due process and " natural justice " on which jurisdiction is based have to do with more ponderable considerations. It should be clear that of the two elements of a " corporation," the tangible group and the incorporeal entity, it is the former, and the former only, that has any bearing on this problem. Whether process served on a member of the corporate group can be the foundation of a judgment against the " entity " so that it will be enforced abroad, and withstand the test of due process at home, turns on whether the active group, the only element in the corporation which can see or hear the writ, understand its import, or act upon it, is sufficiently within the jurisdiction so that it can fairly be made to stand suit there, and whether the particular person on whom the writ was served was a sufficiently responsible member of the intelligent portion of the group to make it moderately certain that the guiding officers will be apprised of the suit. These can be, of course, only rough criteria, as is inevitable in any portion of the law which has historical roots. A certain degree of arbitrariness is perhaps a necessity; policy is too vague a thing to be made the sole guide. Yet the standards of decision should at least have some relation to the underlying considerations of policy. Corporate metaphysics, certainly, should have no place in determining them. No sheriff ever served a writ on an intangible entity.

In the actual decisions, as I have shown,[1] the doctrine of implied consent arising out of the act of doing business in the state reached on the whole the results which these underlying considerations of policy called for. A corporation is not

[1] *Supra*, 91 ff.

supposed to have " consented " unless it is in a substantial way " doing business " in the state. Sporadic, isolated acts are not enough.[1] And even though it is doing business, it is not presumed to have consented to any unreasonable mode of service.[2] Yet even when limited by these qualifications, the doctrine is in practice highly unsatisfactory. It leads the courts into fruitless and unprofitable speculation as to the extent of " presumed " consent, and diverts attention from those considerations, relating to the presence of the active group and the representative character of the agent served, which alone are relevant to the problem of constitutional jurisdiction.[3]

The unwholesome effect of Taney's geographical theory may be traced in other directions. It has been held in some jurisdictions,[4] and in one case in the Supreme Court,[5] that statutory provisions denying the bar of the statute of limitations to " persons out of the jurisdiction " were applicable to foreign corporations, even though they carried on business within the state, and were at all times subject to suit. For this remarkable perversion of the purpose of the provisions

[1] Beale, § 204. [2] *Supra*, 91 ff.

[3] A shining example of the confusion which the doctrine may lead to is to be found in United States *v.* American Bell Telephone Company, 29 Fed. 17 (1886). The defendant corporation had entered into an agreement with a local corporation by which the latter was licensed to use the former's patents, in return for one half the profits. The question was whether this agreement brought the defendant sufficiently " within the state " to render it suable. Eminent counsel argued that the corporation, because it was organized to hold a federal patent, had thereby ceased to be a state corporation, becoming national in character, and that the result of this metamorphosis was to give the " entity " a presence throughout the Union, so that it could be sued even where it was not itself doing business! The court, instead of dismissing the argument as irrelevant, found it necessary to point out in detail why a patent did not change the paternity of the corporation.

[4] Bank of Tennessee *v.* Armstrong, 12 Ark. 602; North Missouri Railroad *v.* Akers, 4 Kans. 453; Robinson *v.* Imperial Silver Mining Company, 5 Nev. 44; Olcott *v.* Tioga Railroad Company, 20 N. Y. 210 are the leading cases. See Beale, § 76, note 49.

[5] Tioga Railroad *v.* Blossburg and Corning Railroad, 20 Wall. 137 (following state law).

the doctrine that a corporation can have no existence outside of the state in which it is created is wholly responsible. Fortunately a majority of the states has taken the view that for the purposes of the statute a corporation is not " out of the jurisdiction " so long as it can be served with process within its borders.[1]

It is in the treatment of the constitutional rights of corporations, however, that the conception of a corporation as a pure creature of the law has had its most unfortunate consequences. At a time when constitutional limitations were looked upon as merely declaratory of natural rights, a theory which directed the attention solely to the intangible legal entity could not bring satisfactory results. For clearly the legal entity had no " natural rights." [2] Since it has only those powers and capacities which the legislature has seen fit to give it, it can claim no rights superior to the legislature, except such as arise out of contract. The stream cannot rise higher than its source.[3] *A fortiori* it could assert no constitutional rights against a foreign state with which it stood in no contractual relations. Under the doctrine of comity its very existence in that foreign state depended upon the whim of the legislature. Since it did not even possess the primary natu-

[1] McCabe *v.* Illinois Central, 4 McCr. 492; Huss *v.* Central Railroads, 66 Ala. 472; Lawrence *v.* Ballou, 50 Cal. 258; and other cases cited in Beale, *ibid.*, 51.

[2] Hosmer, C. J., in New York Firemen Insurance Company *v.* Ely, 5 Conn. 560, 568: " An individual has an absolute right freely to use, enjoy and dispose of all his acquisitions, without any control or domination, save only by the laws of the land. But the civil rights of a corporation (for it has no natural rights) are widely different. The law of its nature or its birthright, in the most comprehensive sense, is such, and such only, as its charter confers." And see Marshall, C. J., in Head *v.* Providence Insurance Company, 2 Cranch, 127, 168. Cf. Brewer, J., in Northern Securities Company *v.* United States, 193 U. S. 197, 362 (1904), " A corporation, while by fiction of law recognized for some purposes as a person, and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person." And see State *v.* Berea College, 123 Ky. 209.

[3] Baron Manwood's famous syllogism puts the same thought in its theological aspects: " None can create souls, but God; but a corporation is created by the King; therefore a corporation can have no soul." 10 Co. 32. 2 Bulst. 233.

ral right to exist, obviously it could not possess any of the lesser rights, of property, of liberty of contract, of freedom in the exercise of its faculties.

But when we look beyond the legal entity to the tangible group the matter takes on a different aspect. It is to this group that the " rights " in a constitutional sense belong. It is their interests, in so far as they accord with certain principles of national policy, not the interests of a " creature of the law " that the constitution was designed to protect. Now this group is as real, and its interests are as real, in one state as in another. They are as much jeopardized when a foreign state subjects them to arbitrary or discriminatory legislation as when they receive such treatment from the state in which they were incorporated. The constitutional question, then, must be whether the law of the state, whether domestic or foreign, arbitrarily and oppressively encroaches on these group interests, or whether it is merely a legitimate burden imposed for meritorious social purposes. The social purposes for which legislation may override private interests are of the broadest sort, and fortunately their scope is constantly growing. A state is fundamentally interested in the activities of corporations within its boundaries. It is interested in the wages which they pay, in the conditions of labor which they maintain, in the price and quality and quantity of their output, in their solvency and honest management, in their accountability before courts of justice. But these are interests which attach to domestic corporations as well as to foreign ones. All legislation must be tested, then, by the fundamental criterion whether it is reasonably adapted to securing these interests; and whether it proceeds in its incidence on a classification which bears a reasonable relevance to the practical problem of securing them.

In its application to the constitutional problem, the geographical theory of Taney suffered a curious modification in

some of the later authorities. His theory was that the foreign "entity" could *never* enter the state, but that by the doctrine of comity it might transact business there through agents *although itself absent*, the state reserving, however, complete power to exclude or expel those agents, or restrict their business, at will. In some of the later cases it seems to have been assumed that the effect of the doctrine of comity was to bring the entity itself within the state, the state reserving, however, the right to *expel the entity* whenever it wished. This was the argument that was used, as has been seen,[1] in the first case in which the Fourteenth Amendment was invoked by counsel as a protection against arbitrary discriminations.[2] It has led to an ambiguous use of the term "power to exclude" which has been the source of much confusion. The power to exclude an "entity," if it is anything, is a power by legislative fiat to refuse it recognition as a legal person. This is a power which, in so far as it exists, is self-executing. In so far as it was thought to deal purely with an intangible creature of the law, it could properly be considered an absolute power. But when the term was transferred from the abstract entity to the tangible group, it was obviously used in an entirely different sense. Here it means the constitutional power to prevent individuals from carrying on certain kinds of group activities, a power that is not self-executing, but must be made effective with the aid of the sheriff and the police. It is a power to restrict the activities of human beings, and cannot, under American principles of

[1] *Supra*, 107–108.

[2] Fire Association *v.* New York, 119 U. S. 110, 119. "If it [the state] imposes such license fee as a prerequisite for the future, the foreign corporation until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given." Cf. Mr. Freund's curious opinion (Police Power, § 717), that when a corporation engages in interstate commerce in a state without its permission, the "entity" remains outside. The precise effect of expelling an entity from the state without touching its business is not stated.

constitutional law, be considered absolute; it cannot be arbitrarily exercised.

Hence the course of development which has been traced in previous chapters, by which foreign corporations have been accorded the protection of the Fourteenth Amendment, seems on principle eminently sound. Whatever a system of law may think about it, in fact a group engaged in a coöperative undertaking has common, group interests. That is fact, not fiction. To protect those interests, the group has acquired a set of legal rights and powers and privileges which has been denominated legal personality. If a neighboring state refuses to recognize these rights, it to that extent impairs the group interests, and this impairment must be justified as an exercise of general legislative power. If the corporation is required to pay a tax which on general constitutional principles is discriminating or spoliative, or if obstacles are placed in the way of its activities without justification, or if it is subjected to an illegal jurisdiction, its rights under the Fourteenth Amendment are impaired. All this springs necessarily from the acknowledged principle that a corporation is a person within the terms of that amendment. And if it is the tangible group rather than the tenuous entity that is constitutionally protected, it seems equally clear that a corporation is a " person within the jurisdiction " under the second clause of the Amendment, wherever the group activities are being carried on and whatever the character of the business. On this problem, as on the problem of jurisdiction, no lawyers' conceits as to the whereabouts of an invisible figment of the judicial mind can have the remotest bearing.

This is not taking from the state its power to control its domestic affairs. If the state conceives that certain kinds of business should not be conducted within its borders at all, and if in the exercise of the police power it is justified in so

doing, of course foreign corporations would not be exempted from the prohibition. If it reasonably concludes that other forms of activity, while permissible on the part of individuals are injurious when carried on by corporations, foreign as well as domestic corporations would be properly excluded. Again, in a field of activity which the general incorporation laws do not cover, and in which the policy of the state may call for only a limited number of corporations, foreign corporations could not complain if this policy excluded them. A state could, moreover, establish a standard for all corporate business within the state, designed to secure solvency and honesty of corporate management, and declare that no corporation, domestic or foreign, should carry on business within its borders without complying with the standard. Subject to the Commerce Clause, this would all fall within the scope of general legislation. But it seems utterly inconsistent with the fundamental policy of the Constitution that a state which grants complete freedom of incorporation within its borders, in a given field and under given regulations, should be allowed to refuse to corporations of other states, formed under similar conditions and complying with substantially similar standards, the right to carry on business within the state, and should be free to subject them to arbitrary exactions on the theory that all their rights grow merely out of comity.

It may be objected that this is reading into the form of the Fourteenth Amendment the substance of the privileges and immunities clause. The two are, however, to a large degree overlapping. The latter is narrower in substance, since it forbids only discriminations based on citizenship; the former is narrower in form, since it applies only to discriminations affecting "persons within the jurisdiction." In the substantial area to which they are both applicable, however, there is no real difference between them. The limitation that

a state cannot deny to any person within its jurisdiction the equal protection of the laws means that all legislative classifications must rest on some justifiable basis; and it seems clear that no justification which violated the policy of the privileges and immunities clause would be accepted. It remains true, however, that because of its formal limitations, the Fourteenth Amendment is not as effective a safeguard against interstate discrimination as the privileges and immunities clause. As to corporations, this is clearly shown in the decision of the Supreme Court in Blake *v.* McClung,[1] involving the constitutionality of a state statute giving residents of the state priority over nonresidents in the distribution of assets of insolvent foreign corporations. The statute was contested by a group of individual creditors, and by a Virginia corporation, also a creditor. As to the former a majority of the court held that the law violated the privileges and immunities clause of the Constitution; but as to the foreign corporation, the discriminating law was sustained. The court pointed out that the corporation was not "deprived" of any property, within the meaning of the Fourteenth Amendment, since it was merely denied the right to prosecute a cause of action against assets within the state; and it could not complain that the state denied it the equal protection of the laws, since it was not a "person within its jurisdiction."

Even as applied to corporations, such a statute seems so clearly contrary to the policy of Article IV, Section 2 of the Constitution, that the decision suggests the question whether the Supreme Court is committed beyond recall to the principle that corporate business does not come under the protection of the clause. The purposes of that clause were primarily commercial. It was designed as a more succinct summary of the corresponding clause in the Articles of Con-

[1] 172 U. S. 239 (1898).

federation,[1] which expressly guaranteed to the people of each state "all the privileges of trade and commerce subject to the same duties and restrictions as the inhabitants thereof respectively." Contained in an international treaty, language of this sort has, as we have seen, frequently been held applicable to corporations.[2] For in commercial affairs, the business unit, not the human individual, is significant; and today the typical business unit is the group. That such a group, once it has gone through the formalities of incorporation, is a person within the meaning of the Fourteenth Amendment, seemed so clear to the Supreme Court, when the question first arose, that it declined to hear the point argued.[3] Such terms as "inhabitant," "occupier," etc., had been applied to corporations, as we have seen, before the Constitution was framed.[4] Provided it is within the policy of the language, it is no more extreme to call a corporation a citizen. "Resident," "inhabitant," "occupier," describe persons bearing certain physical relations to a geographical spot. Terms like "subject," "national," "citizen," describe persons bearing certain diplomatic and legal relations to a sovereign. If the word person comprises corporations, why should not words describing persons in special legal relations have as broad a significance, unless the relations are such that the term is clearly inapplicable to corporations? When the Constitution provides that "No person shall be a Representative who shall not . . . have been seven years a citizen of the United States," it is obviously describing a person in a legal relation which a corporation can not assume. But it is abundantly clear that the term citizen was not used in this sense in the Constitution. As Webster long ago pointed out,[5] that clause does not entitle a citizen of one state to vote

[1] Art. iv, par. 1. [2] *Supra*, 52.

[3] Santa Clara County *v.* Southern Pacific Railroad, 118 U. S. 394 (1886).

[4] *Supra*, 51.

[5] 13 Pet. 519, 552.

in another state. The privileges and immunities clause was enacted to secure against discriminating legislation interests which are as appropriate to corporations as to individuals. I do not mean that anything which a state should see fit to call a corporation should be deemed a citizen. There must be the human substratum, the group whose interests the legal personality protects. This is the substance to which the policy of the Constitutional clause attaches. My point is that once this substance is recognized, there is nothing in the form of the legal entity to render the word citizen inapplicable.

In an earlier chapter I have shown that the ground on which corporations were not brought within the phrase was primarily an exaggerated conception of the legal consequences which such a construction would entail. It was thought, as is natural in a period in which incorporation by special act was still typical, that the effect would be either to place corporations on an equality with individual citizens, or at least to compel a state which created even a single corporation, to throw open the gates to all foreign corporations in that field. Certainly such a result would not be within the policy of the privileges and immunities clause. But it is clear that no such result is necessary. Despite the wording of the clause, " The citizens of each state shall be entitled to *all* privileges and immunities of citizens in the several states," it does not mean that there is only one kind of citizen; it does not mean that a state cannot make reasonable legislative classifications among its own citizens, and extend that classification to citizens of the other states. As Mr. Justice Curtis pointed out, in his dissent in the Dred Scott case, " this clause of the Constitution does not confer on the citizens of one state, in all other states, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular

citizens attended by other qualifications." [1] All that it prevents is discrimination on the ground of citizenship. As long as business groups are not allowed to acquire domestic citizenship under a general incorporation act, business groups incorporated in other states cannot complain if they are not freely recognized and admitted to do business. Moreover, as I have pointed out,[2] to ascribe citizenship to a corporation would not prevent the application of different rules to foreign and domestic corporations, where differences in point of fact made the classification reasonable. Indeed except in the class of cases typified by Blake *v.* McClung, the legal consequences of ascribing citizenship to a corporation would be precisely those which logically flow from the doctrine now sanctioned by the Supreme Court, that a corporation may become a person within the jurisdiction, entitled to object against discriminating laws.

Two analogies now firmly established in our constitutional system present a persuasive argument in favor of taking this step. For purposes of jurisdiction, as has been seen, a corporation is now to all intents and purposes a citizen of the state in which it is domiciled. This must be frankly recognized; to retain the fictitious presumption that all its stockholders are citizens of that state would be to leave a serious blemish on our constitutional system. In fact, more often than not, the fiction has been tacitly abandoned, and the corporation referred to as itself a citizen for jurisdictional purposes.[3] To continue in force the precedent that the courts can supply what they consider a constitutional defect by pre-

[1] 19 How. 393, 583 (1856).

[2] *Supra*, 105.

[3] Insurance Company *v.* Francis, 11 Wall. 210, 216 (1870); Ex Parte Schollenberger, 96 U. S. 369, 377 (1877); Railroad Company *v.* Koontz, 104 U. S. 5 (1881); Goodlett *v.* Railroad Company, 122 U. S. 391 (1887); Nashua and Lowell Railroad *v.* Boston and Lowell Railroad, 136 U. S. 356, 372 (1890); Martinez *v.* Asociacion de Senoras, 213 U. S. 20 (1909); Shulthis *v.* McDougal, 225 U. S. 561 (1912).

suming a fact which they know to be untrue, would be a standing invitation to judicial usurpation. The Supreme Court's admission [1] that such a decision goes " to the very verge of judicial power " is but a mild statement of its real character. Moreover the principle, now seemingly established in the Supreme Court,[2] that a state cannot, either directly or by threat of expulsion or indictment, prevent a corporation from asserting its rights in the federal courts, shows that the "doctrine of indisputable citizenship" is not a mere procedural fiction. It confers substantial rights, and results in important limitations on the legislative powers of the state.

And if we look at the scheme of the Constitution as a whole, there is little ground to doubt that the word " citizen " was used in precisely the same sense in the jurisdictional provisions, as in the privileges and immunities clause. Both were designed to secure citizens against discrimination and hostile treatment on the ground of citizenship — the former against legislative inequalities, the latter against the more intangible and elusive influence of hostility in judicial procedure. Indeed Hamilton looked upon the jurisdictional provisions primarily as the procedural machinery for effectively securing the substantial rights conferred by the privileges and immunities clause. In No. 80 of the Federalist, he wrote: [3]

It may be esteemed the basis of the Union that " the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that, in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to

[1] St. Louis and San Francisco Railway *v.* James, 161 U. S. 545, 563 (1896). Repeated in Doctor *v.* Harrington, 196 U. S. 579 (1905).

[2] *Supra*, 138–140. [3] Lodge ed. 497.

another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

On a sound view of the Constitution as a whole, therefore, such cases as Paul *v.* Virginia and Bank of Augusta *v.* Earle, on the one hand, and the Letson and Marshall cases on the other, should not be taken to have established that a corporation is not entitled to the protection of the privileges and immunities clause; but rather that the right to bring suit on an equality with individual citizens is one of the privileges to which corporations are entitled even before the era of freedom of incorporation, while the right to conduct business within the state on an equality with individual citizens is not such a privilege. On principle this seems a sound distinction. The right to bring suit is one of those rights which foreign jurists refer to the " civil capacity " of a corporation, as distinguished from its " functional capacity," and which they almost unanimously assert a corporation is in international law entitled to demand as of right in the courts of every sovereign. It is a right with respect to which no reasonable classification can be made between individuals and corporations, excepting matters of procedure and security. " The right to sue and defend in the courts," as the Supreme Court has said, " is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens." [1]

[1] Chambers *v.* Baltimore and Ohio Railroad, 207 U. S. 142, 148 (1907). Cf. Young, Foreign Companies, 89: " This is not so much a right as the means of

If this view is correct, it naturally follows that a corporation of another state can demand, as of right, recognition not only in the federal courts, but in the courts of every state in the Union, on a basis of substantial equality with individual citizens. There have been strong intimations that the Supreme Court is prepared so to hold. In International Text Book Company *v.* Pigg,[1] involving the right of a state to prevent a foreign corporation engaged in interstate commerce from suing in its courts until it had complied with certain conditions, the court quoted the extract in the foregoing paragraph, and continued: "How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided." It is not seldom that state courts are more forward in safeguarding national interests than the United States Supreme Court; yet in this instance a state court of last resort has in a series of cases held that under the privileges and immunities clause of the Constitution, a law denying access to the courts to foreign corporations was void.[2] The result seems to have been reached, it is true,

realizing rights. To deny it would be to deny, for instance, that a German manufacturing company can sue in an English court for the price of goods sold and delivered in Germany to a domiciled German who had subsequently migrated to England. Without it a foreign juristic person would have no means of protecting itself: and its admission to personal status and to the exercise of capacities in virtue of such status would be illusory. Capacity to sue stands therefore on a footing different from that of other capacities." Lindley, Company Law, 6th ed., 1221: "It is an established rule of private international law that a corporation duly created according to the laws of one state may sue and be sued in its corporate name in the courts of other states."

[1] 217 U. S. 91 (1910). See also Buck Stove Company *v.* Vickers, 226 U. S. 205 (1912).

[2] Missouri: International Textbook Company *v.* Gillespie, 229 Mo. 397 (1910); State ex rel. *v.* Grimm, 239 Mo. 135 (1912); British-American Cement Company *v.* Citizens' Gas Company, 255 Mo. 1, 164 S. W. 468 (1914); Mining and Milling Company *v.* Fire Insurance Company, 267 Mo. 524 (1916). In the first of these

without any suspicion on the part of the court that such cases as Paul *v.* Virginia existed; yet at the least the cases show what, in the opinion of this court, the rule should have been in the absence of authority.

The other analogy which points persuasively toward the abandonment of the doctrine that a corporation is not entitled to the protection of the privileges and immunities clause, is to be found in recent decisions under the Fourth Amendment in the bill of rights of the federal Constitution. The amendment declares that " The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Despite the strong flavor of *genus homo* which pervades the Article, the Supreme Court has held it applicable to a cor-

cases the court held, citing the Pigg case, " That where a foreign corporation has a valid cause against a citizen of this state it may sue said citizen thereon in the courts of this state, provided a citizen of this state might do the same, notwithstanding the provisions of said § 1026 to the contrary." (Page 423.) In the second, the court confuses in a curious manner the privileges and immunities clause in Art. IV, § 2, and the clause relating to privileges and immunities of citizens of the United States, in the Fourteenth Amendment. After quoting the Fourteenth Amendment, the court says:

" The last section also provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, which of course includes all of the citizens of all of the states, and the Supreme Court of the United States has repeatedly held that the latter clause includes corporations, whenever engaged in interstate commerce, or whenever legally authorized to do business in any such state or states. . . . That court has also repeatedly held, under the constitutional provisions before mentioned, that any citizen of the United States or of any state thereof, may sue in the courts of any other state, wherever a citizen of such state may do so under the laws thereof." The only authority cited is the Pigg case. Both statements are clearly erroneous. The Supreme Court has never held that a corporation is a citizen under the clause in the Fourteenth Amendment; and it has never held that the right to sue is a privilege or immunity of a citizen of the United States.

In British-American Cement Company *v.* Citizens' Gas Company, on the other hand, Art. IV, § 2, of the federal constitution was invoked.

poration. A subpoena duces tecum of an unnecessarily sweeping character had been served upon the corporation by the Interstate Commerce Commission, and it was resisted, both under the Fourth Amendment, and under the Fifth, which provides among other things that " no person " shall be compelled in a criminal case to be a witness against himself. The privilege against incrimination, the court held, was not applicable to a corporation, despite the presumption that " person " includes juristic entities. But the defense under the Fourth Amendment was sustained.[1] The court said:

> Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the state of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. Gulf, etc., Railroad Company *v.* Ellis, 165 U. S. 150, 154 and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

This case, it is submitted, points to the true rule of constitutional construction. Where words are to be found in the Constitution primarily descriptive of individuals, they will be held in the absence of controlling indications to the contrary, to confer on corporations " constitutional immunities *appropriate to such bodies.*" Since the Supreme Court has already held that constitutional protection against arbi-

[1] Hale *v.* Henkel, 201 U. S. 43 (1906). See Weeks *v.* United States, 232 U. S. 383, 397 (1914).

trary discrimination is as appropriate to corporations as to individuals, it seems a necessary conclusion from the principle announced in this case that corporations should now be entitled to the benefits of Article IV, Section 2 of the Constitution.

The result of such a principle would be twofold. There would be one class of activities, corresponding generally to the European conception of the " civil capacities " of a corporation, as to which all corporations would be entitled to substantial equality with individual citizens. The right to sue and defend in the courts would be a notable example. This class should include, as European jurists conceive it to include, all those collateral and incidental transactions which fall short of the point at which the corporation is considered as " doing business " within the state.[1] It would follow that if a foreign corporation sends an agent into the state to make a single purchase, or to transact an isolated stroke of business, while the corporation itself remains beyond the borders of the state, those contracts and transactions should be placed on a substantial equality with those of individuals, and hence should be upheld and enforced in the state courts whatever may be their general policy toward corporations. As in the case of corporations engaged in interstate commerce, allowable differences in treatment should be only

[1] See Mamelok, 59 ff.; Pillet, 15–16; Young, 89–91. M. Pillet (18) gives a striking illustration of the distinction: " Let us suppose that in a neighboring country, in Germany or in Italy, a society for military training should be established, and clothed with legal personality. It would not enter anyone's mind that this foreign society could extend its activities into French territory. And yet there is no reason why, if the occasion presents itself, it should not, as well as a natural person, be admitted to become a property owner, to sue and be sued, in short to do in a general way all those acts which relate to the administration of its property." The distinction is not always, however, so simple: As Mamelok observes (59), " The confusion between the recognition of legal and civil capacity, and admission for the actual conduct of business, is especially easy in that class of juristic persons whose business is not related to an externally visible mechanical equipment, but consists entirely in the making of legal transactions, as for instance in the case of insurance societies." Cf. the discussion of Bank of Augusta *v.* Earle, *supra*, 42 ff.

such as reasonably relate to procedure and security in the courts.

The other result would be that where a corporation does business within the state, of such substantial and continuous character that it may be deemed present in the state as a group, it is entitled to complain of all discrimination between it and similar domestic institutions which is not based on reasonable legislative classification. The protection would cover the whole range of so-called "functional activities," the kind of activities with which alone the social interests of the state are concerned. They would be subject only to the general legislative power of the state, a power to which, fortunately, the Supreme Court has been for the most part, in recent years, willing to grant a sufficiently broad scope to assure the protection of legitimate local interest.

It is probable that the legal development traced in the foregoing chapters, especially if its consequences are accepted to the extent herein contended for, will call for some modification of the traditional doctrine that it is the state of incorporation, and the state of incorporation alone, which determines the domicil, residence, or citizenship of a corporation. There has been a large European literature on the nationality of a corporation.[1] It has recently been admirably summarized by an English writer,[2] as well as in a Spanish study now accessible in translation;[3] and it is not my purpose to go over the ground again. Briefly, it is clear that except in the case of corporations of a public character, organized by special act, the view that a corporation partakes necessarily of the nationality of the country in which it is incorporated has been very generally rejected. The view most widely prevalent in continental practice is that the nationality of

[1] The latest bibliography is in Borchard, Diplomatic Protection of Citizens, 617.

[2] Young, *op. cit.*, ch. iv.

[3] Arminjon, The Nationality of a Corporation, translated by William E. Spear, for the Spanish Treaty Claims Commission.

a corporation depends upon the seat of its administrative center of business, its "siège sociale." This determines its "personal law," its status under treaties, and its claim to diplomatic protection. In America there are several state decisions which sanction this view, by according different treatment to foreign corporations which have established their principal place of business within the state, and foreign corporations which have merely established a branch office. For purposes of foreign attachment, and of taxation, corporations of the first sort have been held to be "resident" within the state.[1] It has been held that where a foreign corporation establishes its principal place of business within the state, the state courts have power to compel its officers to give access to its list of stockholders to a minority stockholder;[2] and quite recently a California court has ordered such a corporation to hold a stockholders' meeting within the state.[3]

These cases represent a wholesome tendency. I have already alluded to the two elements of a modern corporation,

[1] Farnsworth *v.* Terre Haute Railroad Company, 29 Mo. 75 (1859): "When the foreign corporation has located here, and has its chief office or place of business here, it seems no longer to be regarded as a foreign corporation. It may be sued as an individual resident here. . . . Having its chief office here, it ceases to be, for all the purposes of this law, a foreign corporation." It was therefore held not liable to foreign attachment. In City of St. Louis *v.* Wiggins Ferry Company, 40 Mo. 580 (1867), such a corporation was held a resident "not only for the purposes of suing and being sued, by ordinary process, or by attachment, but for all the purposes of ownership of personal property and of taxation." Cf. Blue Jacket Consolidated Copper Company *v.* Scherr, 50 W. Va. 533 (1901).

[2] State *v.* Thompson's Malted Food Company, 160 Wis. 671, 152 N. W. 458 (1915).

[3] Stapler *v.* El Dora Oil Company, 27 Cal. App. 516, 150 Pac. 643 (1915). Some such distinction must have been recognized by the American courts after the Revolution, in determining the nationality of corporations originally chartered in Great Britain, but operating in this country. Dartmouth College, as is well known, became an American corporation. Dartmouth College *v.* Woodward, 4 Wheat. 636. But the Society for the Propagation of the Gospel remained a British corporation. Society *v.* Wheeler, 2 Gall. 105. The only difference was that in the former case the administrative center was in the United States, while in the latter the corporation

the tangible active group, the business unit, and the legal unit created by law to protect its interests, and to the danger of attributing to one characteristics which can only be sensibly attached to the other. We have seen the maze of contradiction in which the courts lost themselves when they attempted to ascertain the "presence" of the corporation for purposes of jurisdiction by looking to the intangible entity instead of looking to the group. The oft-repeated statement that a corporation is always and necessarily domiciled in the state of its incorporation rests on the same conception.[1] If a corporation could not exist outside the state of incorporation, obviously it could be domiciled only within its borders. But to speak of the domicil of an intangible entity is of course a fiction. The term domicil, as applied to a human being, connotes two elements: a set of legal relations, and a physical fact. In general, a person's home is his domicil; and his domicil determines the law by which certain of his rights and liabilities are governed. To make the rights and liabilities of a corporation depend upon a fictitious domicil ascribed by law to the intangible entity is to disregard the tangible, physical element entirely. It has always been the pride of the common law that an individual's legal domicil, what Mr. Justice Holmes has called his

was managed, virtually, by the Church of England. Cf. Martinez *v.* Asociacion de Senoras, 213 U. S. 20 (1909), where it was held that a corporation established in Porto Rico ceased to be a Spanish corporation after the cession to the United States. "We confine this statement," said the court, "to a corporation like the one before us, formed for charitable purposes and limited in its operations to the ceded territory. A different question (which need not be decided) would be presented if the corporation had other characteristics than those possessed by the one under consideration, as, for instance, if it were a Spanish trading corporation, with a place of business in Spain but doing business by comity in the island of Porto Rico." See also Beale, Foreign Corporations, § 72.

[1] See Beale, § 71. Bergner and Engel Brewing Company *v.* Dreyfus, 172 Mass. 154 (1898). Cf. Merrick *v.* Van Santvoord, 34 N. Y. 208 (1866): "A corporation is an artificial being, and has no dwelling either in its office, its warehouses, its depots or its ships. Its domicile is the legal jurisdiction of its origin, irrespective of the residence of its officers or the place where its business is transacted."

" technically preëminent headquarters," [1] has been made to bear as close a relation as may be to the layman's idea of his home, of the place where the physical man lives. This has been a valuable conception, for one of the most useful functions of the law is to guide the conduct of laymen who do not understand technical refinements. This policy applies with equal force to corporations. The layman does not see the intangible entity. That is a vision which is accorded only to the legally initiated. The layman sees the *business*, to him *it* is the corporation, and it most certainly has a home, its principal office.

It is significant that whenever it has become necessary for the courts to ascertain the residence or domicil of a corporation at some fixed point within a state, they have quite naturally turned their attention to the tangible business rather than to the entity. In an early South Carolina case the court put the matter well: [2]

> I take it that residence is a place of legal abode in its legislative meaning. A corporation must have some abiding place, of local definiteness. Is there anything out of the way in saying where a bank *resides?* We all understand the import of the words, " where is a bank, or other corporation, situated ? " It is situated where it is in the habit of doing its business.

The Supreme Court of the United States, also, has held a domestic corporation to be " resident " within the meaning of the judiciary laws, in the district in which its principal offices are located, at " such offices as answer, in the case of corporations, to the dwelling of an individual." [3]

For constitutional purposes, it seems necessary that some further criterion than the state of incorporation be adopted to determine citizenship and domicil. It is not necessary

[1] Bergner and Engel Brewing Company *v.* Dreyfus, 172 Mass. 154 (1898).

[2] Cromwell *v.* Insurance Company, 2 Rich. 512 (1845). See also Beale, § 77, and cases cited.

[3] Galveston, Harrisburg, etc., Railway *v.* Gonzales, 151 U. S. 496 (1894).

that a corporation should ever be considered a citizen of a state in which it is not incorporated; the point is rather that incorporation of itself should not be enough to confer citizenship. Undoubtedly the type which is normal, and to be encouraged, is the corporation formed under the laws of the state in which it maintains its principal office and administrative organization. Such a case presents no difficulties; there can be no doubt that its domicil and citizenship must be in that state alone. On the other hand it seems equally clear that such a corporation as that encountered in Land Grant Railway and Trust Company *v.* County Commissioners,[1] authorized to do business in any state except that of its incorporation, cannot claim constitutional privileges in another state. " No rule of comity," and certainly no rule of compulsion, " will allow one state to spawn corporations, and send them forth into other states, to be nurtured and do business there, when said first mentioned state will not allow them to do business within its own boundaries."

The intermediate case, of a corporation organized with power to do business everywhere, but whose principal office is in another state than that of its incorporation, raises more doubtful questions. The rule most widely prevalent seems to be that such a corporation is on principles of comity entitled to recognition elsewhere.[2] It is submitted, however, that such a corporation should not be accorded a constitutional claim to recognition and equal treatment. The analogy of a natural person is strong. He can claim protection as a citizen of a state only if he in fact bears some relation to the soil of that state. The state's mere will to make him a citizen has no significance in international or constitutional law, in the absence of such a relation. Moreover it would clearly be an exercise of legislative power based on a

[1] 6 Kans. 245 (1870). See an interesting discussion of this case in Young, 121 f.

[2] Beale, § 114. Demarest *v.* Flack, 128 N. Y. 205, is the leading case.

reasonable classification, for a state to declare that only such corporations could do business in the state, as were incorporated under the law of their physical domicil. This was the recommendation of the Congress of Joint Stock Companies in Paris, 1889:[1] "The nationality of a joint stock company shall be determined by the law of the place where it was constituted; and where the center of its administration has been fixed. The center of administration of a company can be in that country only in which the company was constituted." And the draft of the Uniform Corporations Law of the Commissioners on Uniform State Laws not only requires the principal business office to be within the state of incorporation[2] but seemingly excludes from the state any foreign corporation that has not complied with this provision.[3] To corporations of this kind, therefore, the rule of presumptive comity should apply, but not the rule of constitutional compulsion.

Such a recognition of a natural foundation for the domicil of a corporation would, moreover, provide a solution of the perplexing problem of the citizenship of a corporation organized in two or more states.[4] For all practical purposes, such an organization is a unit. As long as the law continues to contemplate it as a number of separate corporations, it is defying the common understanding of the business world. For purposes of local law, there is no constitutional reason why each state should not, if it desires to speak in terms of fiction, call the combination a domestic corporation. The

[1] See Young, 125. [2] Art. 2, par. v.

[3] § 30: "No corporation hereafter formed in any state, territory, federal district or possession of the United States for the purpose of carrying on a business authorized by this act, under any statute other than this or substantially similar business corporation law, shall be entitled to do business in this state." The Commissioners add a note: "This is a necessarily drastic provision. Nothing less severe seems practical." The draft may be found in the Report of the Commissioner of Corporations, on State Laws Concerning Foreign Corporations (1915), 210.

[4] *Supra*, 69 ff.

name does not affect the state's power of legislation. But for constitutional purposes, and especially in determining the jurisdiction of the federal courts, some other criterion than the state's will as expressed in its legislation must govern. The state's mere declaration that the corporation shall be deemed a citizen of the state cannot be enough. The Supreme Court has already so held where the corporation was originally incorporated in one state, and then reincorporated in another; the first state alone determines citizenship.[1] Generally, in all likelihood, this would be the state in which the corporation has its headquarters. Where the corporation is simultaneously incorporated in more than one state, the principle of priority proves inadequate; and in the most recent case involving such a corporation, there is at least a hint that the location of the principal office might be a factor in determining citizenship.[2] Any other rule would virtually leave to the corporation, where it was a plaintiff, the option of choosing its own citizenship for the special purposes of each suit; and where it was sued, would deny to it the privilege of foreign citizenship in any of the states. Both results seem inconsistent with sound constitutional principles, and both would be avoided by basing citizenship on the business headquarters of the corporation.

[1] St. Louis and San Francisco Railway *v.* James, 161 U. S. 545 (1896). See *supra*, 73 ff.

[2] Patch *v.* Wabash Railroad Company, 207 U. S. 277 (1907). *Supra*, 75.

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